(1)

Supreme Court, U.S.
FILED

95 676 OCT 24 1995

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1995

DOMINGO GUEVARA,

Petitioner,

v.

MARITIME OVERSEAS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID W. ROBERTSON
COUNSEL OF RECORD
727 EAST 26TH STREET
AUSTIN, TEXAS 78705
512/471-1124
512/471-6988 (FAX)

DENNIS M. MCELWEE
SCHECHTER & MARSHALL L.L.P.
3200 TRAVIS
HOUSTON, TEXAS 77006
713/757-7811
713/751-0412 (FAX)

131 pp

QUESTION PRESENTED

Whether the general maritime law of the United States permits an award of punitive damages against a maritime employer who willfully and callously violates an ill or injured seaman's rights by refusing to provide maintenance (food and lodging) and cure (medical care).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 5

I. The Decision Below Places the Fifth Circuit in Conflict with the First, Second, Third, Fourth, Sixth, and Eleventh Circuits, and with the Supreme Court of Alaska 6

II. The Conflict is Unlikely to Resolve Itself. This Court's Help is Needed 7

III. The Principal Sources of the Conflict are this Court's Opinions in *Vaughan* and *Miles* 10

IV. The Issue Presented is of Major Importance to the Shipping World 11

V. The Issue Demands Uniform Treatment 14

VI. There are No Jurisdictional or Prudential Impediments to Granting the Petition 14

Page

VII. The Decision Below is Erroneous 15

A. The court below eviscerated *Vaughan* and misinterpreted *Miles*. 15

B. The court below erred by treating distant cousins like "Siamese twins.". 19

C. The court below mistakenly assumed that punitive damages were not available to seamen in the pre-Jones Act era 21

D. The decision below may have been driven by a misplaced fear of punitive damages rampant 25

E. The decision below will foment litigation 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Aguilar v. Standard Oil Co., 318 U.S. 724, 730 (1943) 26

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 280 n.4 (1975) 15

Al-Zawkari v. American Steamship Co., 871 F.2d 585, 590 n.8 (CA6 1989) 6

Anderson v. Texaco, Inc., 797 F.Supp. 531, 536 (E.D.La.1992) 10, 21

Anglada v. Tidewater, Inc., 752 F.Supp. 722, 724-25 (E.D.La. 1990) 21

Babbidge v. Crest Tankers, 1992 AMC 2471, 2473-74, 1991 WL 432058 (D.Me.1991) 6, 8

Bachu v. Int'l Marine Terminals, 1991 WL 211519, at *1 (E.D.La. Sept. 26, 1991) 10

Baker v. Raymond International, Inc., 656 F.2d 173 (CA5 1981), cert. denied, 456 U.S. 983 (1982) 25

Baltimore S.S. Co. v. Phillips, 274 U.S. 316 (1927) . . 20

Barnes v. Andover Co., 900 F.2d 630, 634 (CA3 1990) 26

Page

Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, 447 (CA2), cert. denied, 359 U.S. 1000 (1959) 19

Bell v. Zapata Haynie Corp., 855 F.Supp. 152, 154 (W.D.La.1994) 10

Breshears v. River Marine Contractors, Inc., 1992 WL 245656, at *2 (E.D.La. Sept. 10, 1992) 10

Brown v. OMI Corp., 1994 WL 39026, at *6 (S.D.N.Y. Feb. 9, 1994) 7, 8

Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528 (1938) 26

CEH, Inc. v. F/V Seafarer, 880 F.Supp. 940, 954 (D.R.I.1995) 6, 8, 9

Chambers v. NASCO, Inc., 501 U.S. 32 (1991) 28

Chandris, Inc. v. Latsis, 115 S.Ct. 2172, 2183 (1995) . 9

City of Milwaukee v. Cement Division, ___ U.S. ___, 115 S.Ct. 2091 (1995) 17, 18

Collie v. Fergusson, 281 U.S. 52, 55 (1930) 27

Collinsworth v. Oceanic Fleet, Inc., 1991 WL 165732, at *3 (E.D.La. Aug. 19, 1991) 10

Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367 (1932) 20

Page

Deisler v. McCormack Aggregates Co., 54 F.3d 1074, 1087 (CA3 1995) 7, 8

Duplantis v. Texaco, Inc., 771 F.Supp. 787, 788-89 (E.D.La. 1991) 9, 21

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 259 (1979) 4

Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1284 (CA1 1993) 8

Farrell v. United States, 336 U.S. 511, 516 (1949) . . 26

Fitzgerald v. United States Lines Co., 306 F.2d 461, 471 (CA2 1962), rev'd on other grounds, 374 U.S. 16 (1963) 19

Flores v. Carnival Cruise Lines, 47 F.3d 1120, 1127 (CA11 1995) 7, 8

Gamma-10 Plastics, Inc. v. American President Lines, Ltd., 32 F.3d 1244, 1257 (CA8 1994), cert. denied, 115 S.Ct. 1270 (1995) 9

Gaspard v. Taylor Diving & Salvage Co., 649 F.2d 372 (CA5 1981), cert. denied, 455 U.S. 907 (1982) 25

Glynn v. Roy Al Boat Management Corp., 57 F.3d 1495, 1505 (CA9 1995) 7

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 572 (1983) 27

Page

Guevara v. Maritime Overseas Corp., 34 F.3d 1279, 1995 AMC 321 (CA5 1994) 11

Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (CA5 1995) 1

Harden v. Gordon, 11 F.Cas. 480, 485 (No. 6,047) (CC Me. 1823) 9

Harper v. Zapata Off-Shore Co., 741 F.2d 87 (CA5 1984) 26

Hines v. J.A. LaPorte, Inc., 820 F.2d 1187, 1190 (CA11 1987) 7

Hodges v. Keystone Shipping Co., 578 F.Supp. 620 (S.D.Tex.1983) 25

Hoeffling v. United States Steel, 792 F.Supp. 1029, 1030 (E.D.Mich.1991) 7, 8

Howard v. Atlantic Pacific Marine Corp., 1992 WL 55487, at *2 (E.D.La. Feb. 28, 1992) 10

Hutto v. Finney, 437 U.S. 678, 689 n.14 (1978) 29

Incandela v. American Dredging Co., 659 F.2d 11, 15 (CA2 1981) 7

Jackson v. The Magnolia, 61 U.S. (20 How.) 296, 335-36 (1857) 11

Kennedy v. Louie, 195 U.S. 632 (1904) 24

Page

Kraljic v. Berman Enterprises, Inc., 575 F.2d 412, 416 (CA2 1978) 3, 7

Lockhart v. Fretwell, 113 S.Ct. 838, 846 (1993) 8

Manuel v. United States, 50 F.3d 1253, 1259 (CA4 1995) 6, 8

Martin v. G & A Limited, 604 So.2d 1014 (La.App.), writ denied, 607 So.2d 557 (La.1992) 25

McMillan v. Tug Jane A. Bouchard, 885 F.Supp. 452, 466 (E.D.N.Y.1995) 7, 8

Miles v. Apex Maritime Corporation, 498 U.S. 19 (1990) 4-6, 8-11, 15-18, 21, 25

Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 545 (1960) 22

Morales v. Garijak, 829 F.2d 1355, 1359 (CA5 1987) 11, 25

Neely v. Club Med Management Services, Inc., 63 F.3d 166, 173 (CA3 1995) 7, 8

Nevitt v. Clarke, 18 F.Cas. 29, 31 (#10,138) (S.D.N.Y.1846) 22

Odeco, Inc. v. Cornish, 1991 WL 148746, at *2 (E.D.La. July 22, 1991) 10

Ortega v. Oceantrawl, Inc., 822 F.Supp. 621, 623-24 (D. Alaska 1992) 10

Page

Owens v. Conticarriers & Terminals, Inc., 591 F.Supp. 777, 791-92 (W.D.Tenn.1984) 6

Pacific Packing & Navigation Co. v. Fielding, 136 F. 577, 579-80 (CA9 1905) 22

Pacific S.S. Co. v. Peterson, 278 U.S. 130, 138 (1928) 20, 21

Paris v. Waterman Steamship Corp., 630 N.Y.S.2d 716 (N.Y.App.1995) 25

Porche v. Maritime Overseas Corp., 550 So.2d 278 (La.App.1989) 25

Ridenour v. Holland America Line Westours, Inc., 806 F.Supp. 910, 911 (W.D.Wash.1992) 10

Ritchie v. Grimm, 724 F.Supp. 59, 62 (E.D.N.Y.1989) . 7

Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1050-51 (CA1 1973) 6

Rodriguez Alvarez v. Bahama Cruise Line, Inc., 898 F.2d 312, 316-17 (CA2 1990) 7, 13, 26

Romero v. International Terminal Operating Co., 358 U.S. 354, 380-81 (1959) 2, 4

Rowan Companies, Inc. v. Badeaux, 1991 WL 175541, at *2 (E.D.La. Aug. 28, 1991) 10

Swift v. The Happy Return, 23 F.Cas. 560, 561 n.2 (#13,697 (D.Pa.1799) 22

Page

The Childe Harold, 5 F.Cas. 619, 620 (#2,676) (S.D.N.Y.1846) 22

The City of Alexandria, 17 F. 390, 393 (S.D.N.Y.1883) (Addison Brown, J.) 12

The City of Carlisle, 39 F. 807 (D.Ore.1889) 23

The Ludlow, 280 F. 162, 163-64 (N.D.Fla.1922) 22

The Scotland, 42 F. 925, 926 (S.D.N.Y.1890) . . 21, 22

The Svealand, 136 F. 109, 110, 112-13 (CA4 1905) . . 24

The Troop, 118 F. 769 (D.Wash.1902), aff'd, 128 F. 856 (CA9), cert. denied 24

The Vigilant, 30 F. 288 (S.D.N.Y.1887) 22

The W.L. White, 25 F. 503, 506 (S.D.N.Y. 1885) . . . 21

Unica v. United States, 287 F. 177, 180 (S.D.Ala.1923) 24

United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975) 18

Vaughan v. Atkinson, 369 U.S. 527 (1962) . . 4, 6, 9-13, 15, 16, 25, 27, 28

Vella v. Ford Motor Co., 421 U.S. 1, 3-4 (1975) 29, 30

Warren v. United States, 340 U.S. 523 (1951) 28

Page

Weason v. Harville, 706 P.2d 306, 310 (Alaska 1985) . 7, 11, 27

White v. American River Transportation Co., 853 F.Supp. 300, 301 (S.D.Ill.1993) 10, 13

Williams v. Kingston Shipping Co., 925 F.2d 721, 722 (CA4 1991) 6, 8, 26

STATUTES:

28 U.S.C. § 1331 2

28 U.S.C. §1254(1) 1

46 U.S.C. app. § 688 1

46 U.S.C. app. §§ 761 5

OTHER:

1B *Benedict on Admiralty* § 51, at 4-80 (7th rev. ed. 1991) 10

6 *Moore's Federal Practice* § 54.78[3], at 54-506 (2d ed. 1986) 9

Admiralty Judges: Flotsam on the Sea of Maritime Law?, 24 J.Mar.L.& Com. 249 (1993) 11

Page

David W. Robertson, "*Displacement of State Law by Federal Maritime Law*," 26 J. Mar. L. & Com. 325 (July 1995) 8

David W. Robertson, *Judge Rubin's Maritime Tort Decisions*, 52 La.L.Rev. 1527, 1572 (1992) 10

Edward J. Devitt, Charles B. Blackmar, & Michael A. Wolff, *Federal Jury Practice and Instructions* § 95.24 (1987) 19

Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 6-38, at 383 (2d ed. 1975) 19

Professor Robert Force's article, *The Curse of Miles v. Apex Marine Corp.*, 55 La.L.Rev. 747 (March 1995) 11

On July 26, 1995, the en banc Fifth Circuit reversed its prior jurisprudence and held that punitive damages are no longer available to penalize an employer who willfully and callously violates an injured seaman's rights by refusing to provide maintenance and cure. Domingo Guevara respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The en banc rehearing opinion of the court of appeals (Appendix D, *infra*) is reported at 59 F.3d 1496 (CA5 1995). The panel opinion (Appendix B, *infra*) is reported at 34 F.3d 1279 (CA5 1994) and at 1995 AMC 321. The district court's decision (Appendix A, *infra*) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Jones Act, 46 U.S.C. app. § 688, is set forth as Appendix E, *infra*.

STATEMENT

This was an injured seaman's action against his employer for personal injury damages under the Jones Act[1] and/or the doctrine of unseaworthiness; for maintenance and cure; and for punitive damages for the defendant's refusal to

---

[1] 46 U.S.C. app. § 688(a).

provide maintenance and cure. The district court had jurisdiction over the Jones Act suit under 28 U.S.C. § 1331; it had "pendent" jurisdiction over the non-statutory claims under this Court's decision in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 380-81 (1959).

* * *

Domingo Guevara was a member of the crew of the vessel OVERSEAS PHILADELPHIA, owned and operated by Guevara's employer, Maritime Overseas Corporation. He sustained a knee injury on the ship at Freeport, Texas, while helping to secure the gangway as part of the vessel's departure procedures.

United States maritime law has always provided that a seaman who is injured in the service of the ship is entitled to maintenance (food and lodging) and cure (medical care) from his employer. Guevara made a number of formal demands on Maritime for maintenance and cure. Maritime refused to pay. Guevara then filed suit, seeking maintenance and cure, compensatory damages for the knee injury, and punitive damages for Maritime's refusal to pay maintenance and cure. Maritime continued for some time to resist meeting its maintenance and cure obligations, but by the time the case went to trial, Maritime had paid the maintenance and cure it owed.[2] Maritime's final payment was made "practically on the eve of trial."[3]

The case proceeded to trial on the remaining counts. The jury found that Maritime was liable under the Jones Act

---

[2]Demand for maintenance and cure was made on February 5, 1991, and repeatedly thereafter. Maritime made a $448 payment in late June and a second and final payment of $1344 on December 29.

[3]App. B at B8.

for its negligence in bringing about Guevara's knee injury,[4] and that Maritime had been guilty of arbitrary and capricious conduct in withholding maintenance and cure payments. The trial court awarded compensatory damages of $131,000 for the knee injury and punitive damages of $60,000 for the arbitrary and capricious refusal to pay maintenance and cure.

A panel of the Fifth Circuit affirmed both awards. As to the punitive award, the court found that the evidence supported the jury's conclusion that Maritime's conduct in delaying the maintenance and cure payments was arbitrary and capricious.[5] It went on to hold that "under the prevailing law of this Circuit"[6] a shipowner "becomes liable for punitive damages when its failure to pay maintenance can be described as callous and recalcitrant, arbitrary and capricious, or willful, callous, and persistent."[7] After granting rehearing en banc, the unanimous Fifth Circuit court reaffirmed the compensatory damages award. The full court also upheld "the jury's finding of Maritime's arbitrary and capricious behavior."[8] However, the court reversed the award of punitive damages, acknowledging that its decision

---

[4]In affirming the award of damages for the knee injury, the Fifth Circuit found sufficient evidence of Jones Act negligence and hence did not find it necessary to reach an alternative jury finding of unseaworthiness. App. B at B6 & n.3, reinstated App.D at D4.

[5]App. B at B7-B9.

[6]App. B at B9.

[7]App. B at B7. All of these "pejorative adjectives" are used as rough synonyms connoting "a wanton and intentional disregard of a seaman's rights." *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412, 416 (CA2 1978). Note that the court below used "arbitrary and capricious" and "willful[ ] and callous[ ]" interchangeably. App. D at D4 and D2.

[8]App. D at D4.

conflicts with those of the First, Second, Fourth, Eleventh, and (probably) Sixth Circuits.[9]

The decision below turned on the meaning of this Court's decisions in *Vaughan v. Atkinson*, 369 U.S. 527 (1962), and *Miles v. Apex Maritime Corporation*, 498 U.S. 19 (1990). *Vaughan* was a maintenance and cure case that has long been read to support punitive damages in cases of highly culpable refusal to provide maintenance and cure. The court below concluded that *Vaughan* no longer provides that support because it "has come to stand for"[10] a much narrower proposition--the occasional availability of an attorney's fees award to punish "bad-faith ... abuses of the litigation process."[11]

The court below took *Miles* as its guiding text. *Miles* was not a maintenance and cure case; it was an action for the death of a seaman under the general maritime doctrine of unseaworthiness. In *Miles* this Court held that a seaman's death action under the general maritime law[12] should not result in the recovery of damages for loss of society and lost future earnings because such damages cannot be recovered in actions under the statutes that typically apply in seamen's death cases, the Jones Act and the Death on the High Seas

---

[9] App.D at D28-D33 & n.12.

[10] App. D at D12.

[11] App. D at D15.

[12] "General maritime law" is a synonym for judge-made admiralty or maritime law. See *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 356 (1959). "Admiralty law is judge-made law to a great extent." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1979).

Act (DOHSA).[13] The court below looked to the "logic and analytical framework of *Miles*"[14] for the broad proposition that no category of damages not provided for by the Jones Act can be recovered in any type of seaman's suit under the general maritime law.[15] Taking the view that punitive damages are not provided for by the Jones Act,[16] the court below reasoned that punitive damages are necessarily also unavailable in maintenance and cure actions.[17]

REASONS FOR GRANTING THE PETITION

The court below acknowledged that its decision conflicts with those of the First, Second, Fourth, Eleventh, and (probably) Sixth Circuits.[18] The decision below also conflicts with the position of the Third Circuit and with a well-reasoned decision of the Supreme Court of Alaska.

Such widespread conflict on an issue of major importance to the maritime industries and their employees is insupportable. The issue cries out for uniform treatment, and

---

[13]The Jones Act, 46 U.S.C. app. § 688(a), did not apply in *Miles* because the plaintiff's claim was based on unseaworthiness rather than negligence. DOHSA, 46 U.S.C. app. §§ 761 et seq., did not apply because the death occurred in territorial waters.

[14]App. D at D34.

[15]See App. D at D23-D25.

[16]See App. D at D24-D27 & nn.7 and 9.

[17]See App. D at D38-D39.

[18]The court below suggested that the First, Fourth, Sixth, and Eleventh Circuits may eventually come to see *Miles* as necessitating a change in their positions. App. D at D29-D32. It did not discuss the conflict with the Second Circuit other than to acknowledge its existence. App.D at D31 and D33 n.12.

the conflict cannot be resolved without this Court's help. The principal sources of the conflicting jurisprudence are this Court's *Vaughan* and *Miles* opinions. The present case is a fine opportunity for this Court to clarify those decisions. There are no jurisdictional issues and no prudential problems. The case involves a single issue, and that issue is cleanly presented: The court below concluded that the present employer was guilty of an intentional and wanton disregard of an injured seaman's rights but that punitive damages cannot be awarded to punish such conduct. This is an extremely significant legal conclusion. Moreover, it is wrong.

I. The Decision Below Places the Fifth Circuit in Conflict With the First, Second, Third, Fourth, Sixth, and Eleventh Circuits, and with the Supreme Court of Alaska.

The decisions addressing the availability of punitive damages for culpable failure to provide maintenance and cure take three distinct positions. In the First,[19] Fourth,[20] Sixth,[21] and Eleventh Circuits,[22] and in Alaska state

---

[19] *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1050-51 (CA1 1973); *Babbidge v. Crest Tankers*, 1992 AMC 2471, 2473-74, 1991 WL 432058 (D.Me.1991). Cf. *CEH, Inc. v. F/V Seafarer*, 880 F.Supp. 940, 954 (D.R.I.1995) (relying on *Pocahontas* in awarding punitive damages for the willful destruction of plaintiff's lobster gear).

[20] *Manuel v. United States*, 50 F.3d 1253, 1259 (CA4 1995). See also *Williams v. Kingston Shipping Co.*, 925 F.2d 721, 722 (CA4 1991) (awarding attorney's fees of $49,104 against an employer for "willfully and arbitrarily" refusing to pay maintenance and cure; evidently punitive damages beyond attorney's fees were not sought).

[21] See *Al-Zawkari v. American Steamship Co.*, 871 F.2d 585, 590 n.8 (CA6 1989). An earlier district court decision had held that punitive damages are limited to attorney's fees. *Owens v. Conticarriers & Terminals, Inc.*, 591 F.Supp. 777, 791-92 (W.D.Tenn.1984). More recently a district court has relied on *Al-Zawkari* for the availability of

courts,[23] full punitive damages are awardable in appropriate cases. In the Second[24] and Third Circuits,[25] punitive damages are awardable but they are limited to attorney's fees. In the Fifth and Ninth Circuits,[26] punitive damages may not be awarded.

II. The Conflict Is Unlikely to Resolve Itself. This Court's Help Is Needed.

Guevara expects that Maritime will oppose certiorari and argue that the conflict among the circuits should be left to work itself out. As is indicated in the preceding section, many courts outside the Fifth Circuit have been committed to

---

full punitive damages. *Hoeffling v. United States Steel*, 792 F.Supp. 1029, 1030 (E.D.Mich.1991).

[22] *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (CA11 1995); *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187, 1190 (CA11 1987).

[23] *Weason v. Harville*, 706 P.2d 306, 310 (Alaska 1985).

[24] *Rodriguez Alvarez v. Bahama Cruise Line, Inc.*, 898 F.2d 312, 316-17 (CA2 1990); *Incandela v. American Dredging Co.*, 659 F.2d 11, 15 (CA2 1981); *Kraljic, supra* note 7, 575 F.2d at 416; *McMillan v. Tug Jane A. Bouchard*, 885 F.Supp. 452, 466 (E.D.N.Y.1995); *Brown v. OMI Corp.*, 1994 WL 39026, at *6 (S.D.N.Y. Feb. 9, 1994); *Ritchie v. Grimm*, 724 F.Supp. 59, 62 (E.D.N.Y.1989).

[25] *Deisler v. McCormack Aggregates Co.*, 54 F.3d 1074, 1087 (CA3 1995). See also *Neely v. Club Med Management Services, Inc.*, 63 F.3d 166, 173 (CA3 1995) (en banc) (referring in passing to "attorneys [sic] fees" for "unreasonable" denial of maintenance and cure).

[26] *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1505 (CA9 1995), held that "punitive damages are not available, although attorney's fees are, where the shipowner has been willful and persistent...". The court below read *Glynn* as taking an identical position to its own. App. D at D33 & n.12.

a different course from the Fifth's newly discovered one. Nevertheless, Maritime will probably contend that as soon as the other courts of appeals and the state supreme courts[27] read the unanimous en banc opinion below and come to understand the "true" reach of this Court's Miles decision, they will fall into line with the Fifth Circuit position.

There are at least five reasons for believing that such a resolution of the conflict is unlikely. First, there is post-*Miles* jurisprudence indicating the continued availability of punitive damages in maintenance and cure cases in the First,[28] Second,[29] Third,[30] Fourth,[31] Sixth,[32] and Eleventh Circuits.[33] Second, punitive damages are widely

---

[27]The Supremacy Clause obliges state courts to follow this Court's maritime-law pronouncements. See generally David W. Robertson, "Displacement of State Law by Federal Maritime Law," 26 J. Mar. L. & Com. 325 (July 1995) (forthcoming). But the state courts are not bound to the maritime-law views of the lower federal courts. See *Lockhart v. Fretwell*, 113 S.Ct. 838, 846 (1993) (Thomas, J., concurring).

[28] See *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1284 (CA1 1993) (explaining that punitive damages are available in maintenance and cure cases in part because the employer's duty is not contractual in nature); *Babbidge*, *supra* note 19, 1992 AMC at 2473-74; cf. *CEH, Inc.*, *supra* note 19, 880 F.Supp. at 954.

[29]*McMillan*, *supra* note 24, 885 F.Supp. at 466; *Brown*, *supra* note 24, 1994 WL 39026, at *6.

[30]*Daigle*, *supra* note 25, 54 F.3d at 1087; *Neely*, *supra* note 25, 63 F.3d at 17[illegible].

[31]*Manuel*, *supra* note 20, 50 F.3d at 1259; *Williams*, *supra* note 20, 925 F.2d at 722.

[32]*Hoeffling*, *supra* note 21, 792 F.Supp. at 1030.

[33]*Flores*, *supra* note 22, 47 F.3d at 1127.

available to maritime plaintiffs other than seamen.[34] Many courts will refuse to believe that the "wards of the admiralty"[35] should suddenly start being treated worse than everyone else. Third, not all courts will agree with the assumption below that the Jones Act precludes punitive damages in actions brought under it.[36] Fourth, in order to fall into line with the Fifth Circuit position, a court would have to agree with an avowedly "revisionist"[37] interpretation of *Vaughan v. Atkinson*.

Finally, many courts will disagree with at least some of the steps in reasoning that are entailed in getting from the *Miles* holding to the result below. These steps include extending *Miles* from death cases to cases involving nonfatal injuries; making an assumption that the *Miles* Court's characterization of damages for loss of society as "non-pecuniary" is *ipso facto* applicable to punitive damages;[38] and drawing an erroneous analogy between the seaman's ancient right to maintenance and cure and the personal injury

---

[34] See, e.g., *Gamma-10 Plastics, Inc. v. American President Lines, Ltd.*, 32 F.3d 1244, 1257 (CA8 1994), *cert. denied*, 115 S.Ct. 1270 (1995); *CEH, Inc.*, *supra* note 19, 880 F.Supp. at 954; *Duplantis v. Texaco, Inc.*, 771 F.Supp. 787, 788-89 (E.D.La. 1991).

[35] *Chandris, Inc. v. Latsis*, 115 S.Ct. 2172, 2183 (1995) (quoting Justice Story's opinion in *Harden v. Gordon*, 11 F.Cas. 480, 485 (No. 6,047) (CC Me. 1823)).

[36] The court below relied on lower-court jurisprudence for the proposition that the Jones Act does not allow for punitive damages. App. D at D24-D25 & nn.7 and 9. The Act itself says nothing about punitive damages, and this Court has never said that it precludes punitive damages.

[37] App. B at B25 n.11 (Garwood, J. concurring, quoting 6 *Moore's Federal Practice* § 54.78[3], at 54-506 (2d ed. 1986)).

[38] App. D at D24 & n.7.

action made available by the Jones Act. Not all courts will be willing to take all those steps. Indeed, a large number of district court decisions have explicitly rejected the argument that *Miles* affects punitive damages in maintenance and cure cases.[39] Without this Court's assistance, the conflict will persist.

III. The Principal Sources of the Conflict Are this Court's Opinions in *Vaughan* and *Miles*.

The court below called *Vaughan* "a difficult decision."[40] At the panel stage below, Judge Garwood called it "ambiguous," "cryptic," and "enigmatic."[41] Courts generally have had difficulty discerning the meaning of

---

[39] See *Bell v. Zapata Haynie Corp.*, 855 F.Supp. 152, 154 (W.D.La.1994); *White v. American River Transportation Co.*, 853 F.Supp. 300, 301 (S.D.Ill.1993); *Ortega v. Oceantrawl, Inc.*, 822 F.Supp. 621, 623-24 (D. Alaska 1992); *Ridenour v. Holland America Line Westours, Inc.*, 806 F.Supp. 910, 911 (W.D.Wash.1992); *Anderson v. Texaco, Inc.*, 797 F.Supp. 531, 536 (E.D.La.1992); *Breshears v. River Marine Contractors, Inc.*, 1992 WL 245656, at *2 (E.D.La. Sept. 10, 1992); *Howard v. Atlantic Pacific Marine Corp.*, 1992 WL 55487, at *2 (E.D.La. Feb. 28, 1992); *Bachu v. Int'l Marine Terminals*, 1991 WL 211519, at *1 (E.D.La. Sept. 26, 1991); *Rowan Companies, Inc. v. Badeaux*, 1991 WL 175541, at *2 (E.D.La. Aug. 28, 1991); *Collinsworth v. Oceanic Fleet, Inc.*, 1991 WL 165732, at *3 (E.D.La. Aug. 19, 1991); *Odeco, Inc. v. Cornish*, 1991 WL 148746, at *2 (E.D.La. July 22, 1991).

[40] App. D at D8.

[41] App. B at B22 at nn.6&7 and B24. Judge Garwood quoted the "ambiguous" description from 1B *Benedict on Admiralty* § 51, at 4-80 (7th rev. ed. 1991). The "cryptic" characterization came from David W. Robertson, *Judge Rubin's Maritime Tort Decisions*, 52 La.L.Rev. 1527, 1572 (1992). "Enigmatic" was Judge Garwood's own term.

Vaughan.[42] The present case is a suitable opportunity for this Court to clarify its meaning.

The *Miles* decision is both unclear and highly controversial. See, e.g., the late Judge John R. Brown's virtual diatribe against the *Miles* decision entitled *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J.Mar.L.& Com. 249 (1993).[43] See also Professor Robert Force's article, *The Curse of Miles v. Apex Marine Corp.*, 55 La.L.Rev. 747 (March 1995) (forthcoming). (Professor Force is the Director of the Maritime Law Center of Tulane University School of Law.) It is putting things mildly to say that *Miles* has caused anxiety and confusion. The court below gave *Miles* an aggressively sweeping application. This Court needs to inform the maritime bench and bar whether the case legitimately has such breathtaking breadth.

IV. The Issue Presented Is of Major Importance to the Shipping World.

Maintenance and cure situations and issues arise daily

---

[42] See, e.g., *Morales v. Garijak*, 829 F.2d 1355, 1359 (CA5 1987) (attributing a serious mistake in the pattern jury instructions being used by Fifth Circuit district judges to "[a] misreading of the Supreme Court's decision in *Vaughan v. Atkinson*"); *Weason*, *supra* note 23, 706 P.2d at 309 (stating that "[t]he ambiguity of *Vaughan* has ... generated a split among the circuits").

[43] Judge Brown wrote that in *Miles* this Court "abandoned its Constitutional duty of enunciating maritime law" (24 J. Mar. L. & Com. at 249); that the *Miles* "Court reversed the Constitutional roles of admiralty judges and Congress" (*id.* at 279); and that *Miles* "was the most strained preemption holding ever reached by an American admiralty judge" (*id.* at 282). He concluded his article by proclaiming: "I believe I express a general, if not universal opinion of the legal profession in saying that the judgment was erroneous." (*Id.* at 285, quoting *Jackson v. The Magnolia*, 61 U.S. (20 How.) 296, 335-36 (1857).)

in the American maritime industries.[44] The magnitude of the problem is suggested by the fact that *American Maritime Cases* (AMC) has reported about one thousand maintenance and cure cases since it began publication in 1923.[45] The existence of a thousand AMC-reported decisions suggests the existence of many thousands more that were unreported, and still more thousands of litigious disputes that were resolved before a court actually had to render a decision in the matter. In his petition for rehearing in this Court in *Vaughan v. Atkinson*, the seaman's employer said the prospect of a penalty for wrongfully withholding maintenance and cure was "causing consternation in the shipping circles of this Country and abroad" and instanced the "hundred upon hundred of

---

[44]In 1883 an experienced admiralty judge said that "multitudes of [ill and injured seamen's] cases must have occurred almost every year from time immemorial." *The City of Alexandria*, 17 F. 390, 393 (S.D.N.Y.1883) (Addison Brown, J.).

[45]In the more recent of the AMC digests, all of the maintenance and cure cases seem to be collected under the entry Personal Injury # 141 (maintenance and cure). In the earlier digests it is necessary to search through several other topics, including Articles and Wages ## 143, 144, and 161 (maintenance and cure; medical care; breach by ship); Illness # 112 (medical care of seamen); Personal Injury ## 118 and 138 (Shipowner's Liability Convention; medical care of seamen). Searching through those topics while taking care not to record the same decision twice yields the following tally, totaling 993 cases:

Digest for:	Number of cases:	Digest for:	Number of cases:
1923-27	24	1963-67	107
1928-32	36	1968-72	70
1933-37	49	1973-77	40
1938-42	78	1978-82	47
1943-47	67	1983-87	42
1948-52	119	1988-92	53
1953-57	122	1993	12
1958-62	114	1994	13

cases arising daily in which this point will be raised."[46] The importance of the issue presented here is further indicated by the large number of shipping interests who appeared as *amici curiae* in the court below. Eight shipowners filed amicus briefs seeking to be freed from the threat of the punitive damages penalty, as did five trade associations claiming to represent over seven hundred other maritime employers.[47]

Finally, the significance of the decision below has been immediate and dramatic. Appendix G, *infra*, sets forth the affidavit of Paul Sterbcow, an admiralty lawyer in New Orleans who represents significant numbers of ill and injured seamen in need of maintenance and cure benefits. Mr. Sterbcow reports that counsel for maritime employers began playing a new form of litigation "hardball" as soon as the opinion below was announced.[48]

V. The Issue Demands Uniform Treatment.

As things now stand, the employers of seamen in New England, the mid-Atlantic states, Georgia, Florida, Alabama, the Great Lakes states,[49] and many of the Mississippi River states cannot willfully and callously violate their employees'

---

[46] *Vaughan v. Atkinson*, 369 U.S. 527 (1962); October Term, 1961, Docket No. 323, Respondent's Petition for Rehearing, pp. 2-3.

[47] See the "Statement of Interest" pages of the amicus briefs in the Fifth Circuit, App. F at F1-F4.

[48] See the Sterbcow affidavit, App. G at G1-G3. Cf. *Rodriguez Alvarez*, *supra* note 24, 898 F.2d at 316 (discussing an employer who "persisted with its hardball tactics and refused to provide Alvarez a single penny for his maintenance and cure until forced to do so").

[49] The only relevant Seventh Circuit jurisprudence is the district court opinion in *White*, *supra* note 39.

rights to maintenance and cure without facing the prospect of full punitive damages. New York and Pennsylvania employers who might be tempted to recalcitrance are threatened with punitive damages limited to attorney's fees. But--at least as far as the federal courts are concerned--employers in Mississippi, Louisiana, Texas, the Pacific coast states, Alaska, and Hawaii are virtually free to be as mean and tough as they wish. Such disharmony is damaging and demoralizing to the American maritime industries and their employees. Furthermore, admiralty lawyers will be forced to engage in many vigorous and unseemly varieties of forum shopping.[50] This Court's help is needed to restore some order.

VI. There Are No Jurisdictional Or Prudential Impediments to Granting the Petition.

As Judge Garwood wrote below, an important issue "is squarely presented in this case."[51] The court below upheld "the jury's finding of Maritime's arbitrary and capricious behavior."[52] It then held as a matter of law that such behavior cannot justify punitive damages. The correctness of that holding is the only issue the case presents. There are no jurisdictional or prudential problems. A cleaner vehicle for deciding this important issue could not be found.

---

[50] Plaintiffs will have to try to avoid the Fifth and Ninth Circuits. They will try their best to litigate in a federal court in one of the other circuits or in a suitable state court. Defendants will have to concentrate on personal jurisdiction, venue, and *forum non conveniens* defenses, and on techniques for removing cases from state to federal court.

[51] App. B at B14.

[52] App. D at D4.

VII. The Decision Below is Erroneous.

A. The Court Below Eviscerated *Vaughan* and Misinterpreted *Miles*.

In *Vaughan* this Court ordered an award of attorney's fees against an employer whose failure to provide maintenance and cure the Court characterized as "callous," "recalcitran[t]," "willful and persistent."[53] *Vaughan* has long served as the principal authority for awarding punitive damages against employers who culpably withhold maintenance and cure. Restricting *Vaughan* to a narrow "abuse of litigation" remedy has been termed "a revisionist view."[54] The court below based its adoption of that revisionist view of *Vaughan* on "seven subsequent Supreme Court cases that have cited the opinion"[55] plus a case from the Sixth Circuit. These were non-admiralty cases citing *Vaughan* in support of the availability of attorney's fees to penalize bad-faith abuses of the litigation process; none even intimates that is *all Vaughan* stands for.

As is indicated above, the *Vaughan* decision is difficult to decipher. But no one who reads Justice Douglas' opinion for the majority in that case with any care can come away believing that affronts to the *courts* were on his mind. As Justice Marshall later noted, the force driving *Vaughan* was "a special concern for plaintiff seamen as wards of the admiralty court."[56] It was the abuse of seamen, not of the

---

[53] 369 U.S. at 530-31.

[54] See note 37, *supra*.

[55] App. D at D11-D12.

[56] *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 280 n.4 (1975) (Marshall, J., dissenting).

litigation process, that drew Justice Douglas' ire, led him to tie the string of "pejorative adjectives"[57] to the employer's conduct, and that produced the ringing phrases Justice Douglas used in concluding his opinion: "a sorry day for seamen" and "a dreadful weapon in the hands of unconscionable employers."[58] Confining the *Vaughan* penalty to "bad-faith ... abuses of the litigation process"[59] violates the decision's language and spirit. The court below eviscerated *Vaughan*.

In contrast, the court below read *Miles* far more broadly than it had ever before been read. In *Miles* this Court characterized the decision's breadth as follows:

> Today we restore a uniform rule applicable to all actions for the death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.[60]

The court below read *Miles* for the much broader rule that no category of damages not provided for by the Jones Act can be recovered in *any* type of seaman's suit. For the court below, *Miles* means that no seaman can ever recover punitive damages. At the heart of the decision below is a robust principle ostensibly derived from *Miles*:

> *If the situation is covered by a statute like the Jones Act or DOHSA*, and the statute informs and limits the available damages, the statute directs and delimits the recovery available under the general maritime law as

---

[57] See note 7, *supra*.

[58] 369 U.S. at 533.

[59] App. D at D15.

[60] 498 U.S. at 33.

well.[61]

Provided one makes two big assumptions--that the Jones Act precludes punitive damages in actions brought under it, and that the Jones Act can be said to "cover the situation" of the maintenance and cure plaintiff--the result below flows inexorably from the court's principle. The court below made the connection explicit:

> [O]nce there is a statutory/general maritime law overlap in the factual circumstances that are covered, the *Miles* damages uniformity principle is invoked, and punitive damages would be precluded under the general maritime action for maintenance and cure.[62]

But one cannot legitimately derive the broad implicit proposition--that analogous statutes always limit the relief available under the general maritime law--from *Miles*. This Court's post-*Miles* decision in *City of Milwaukee v. Cement Division*, ___ U.S. ___, 115 S.Ct. 2091 (1995), belies the notion that the general maritime law is as subservient to statute as the court below thought. In *City of Milwaukee* this Court confronted the argument that a statute providing for postjudgment interest--but not for prejudgment interest--in federal-court litigation means that federal admiralty courts should not award prejudgment interest. Nonsense, said Justice Stevens for the unanimous Court:

> Far from indicating a legislative determination that prejudgment interest should not be awarded, ... *the absence of a statut[ory provision for prejudgment interest] merely indicates that the question is governed*

---

[61] App. D at D23. Emphasis in original.

[62] App. D at D39.

> *by traditional judge-made principles.* Those principles are well developed in admiralty, where "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies."[63]

The viewpoint of the court below--that the absence of a punitive damages remedy in the Jones Act precludes admiralty courts from awarding punitive damages to seamen--is structurally identical to the argument so readily rejected by this Court in *City of Milwaukee*. Just as the postjudgment interest statute says nothing about prejudgment interest, the Jones Act says nothing about punitive damages in maintenance and cure cases. In both situations, the *City of Milwaukee* reasoning means that the federal admiralty courts are charged with fashioning the general maritime law's response to the congressionally unprovided-for situation. The court below was wrong to think that *Miles* could have meant anything to the contrary.

B. The Court Below Erred By Treating Distant Cousins Like "Siamese Twins".

The decision below assumes that the Jones Act precludes punitive damages in personal injury actions brought under it and that *Miles* effectively extends the Jones Act preclusion to personal injury actions brought under the doctrine of unseaworthiness. The court below then extends the supposed preclusion to actions for maintenance and cure. The underlying premise is that maintenance and cure actions are as closely related to Jones Act suits as are unseaworthiness actions. That premise is false.

---

[63] 115 S.Ct. at 2095 (emphasis added; citations omitted). The internal quotation is from *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975).

Judge Friendly once had occasion to explain that "the Jones Act claim and the maritime claim of unseaworthiness ... are so intertwined factually that they cannot as a matter of practice be separated."[64] In the words of the most prestigious admiralty treatise, "the Jones Act count and the unseaworthiness count are Siamese twins."[65] As is illustrated by the decision below, the Jones Act and the doctrine of unseaworthiness are not separate causes of action but alternate routes to the same award of personal injury damages.[66]

In contrast, the maintenance and cure remedy is "completely separate and independent" from the remedy provided by the Jones Act. A standard jury charge states that the seaman's maintenance and cure claim

> is *completely separate and independent* from both the Jones Act and the unseaworthiness claims of the plaintiff, and must be *decided entirely apart* from your determination of those claims. The *only common element* of the three claims is the "seaman" status of the Plaintiff ....[67]

This Court itself has said that the seaman's right to maintenance and cure is "independent of the [seaman's Jones

---

[64] *Fitzgerald v. United States Lines Co.*, 306 F.2d 461, 471 (CA2 1962), *rev'd on other grounds*, 374 U.S. 16 (1963). (Judge Friendly was quoting *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 447 (CA2), *cert. denied*, 359 U.S. 1000 (1959)).

[65] Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 6-38, at 383 (2d ed. 1975).

[66] See note 4, *supra*.

[67] Edward J. Devitt, Charles B. Blackmar, & Michael A. Wolff, *Federal Jury Practice and Instructions* § 95.24 (1987) (emphasis added).

Act] right ... to compensatory damages for an injury caused by negligence."[68]

The great difference between the Jones Act-unseaworthiness relationship and the Jones Act-maintenance and cure relationship is confirmed and emphasized by comparing this Court's decisions in *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927), and *Pacific S.S. Co. v. Peterson*, 278 U.S. 130 (1928). *Baltimore S.S.* held that a judgment on an unseaworthiness claim precludes the later assertion of a Jones Act claim for the same injury. *Pacific S.S.* held that a seaman's recovery of maintenance and cure benefits does *not* preclude a subsequent Jones Act suit based on the same injury.

The decision below thus rests on a false analogy.[69] In actuality the Jones Act and the law of maintenance and cure are not Siamese twins but distant cousins. Even if the Jones Act explicitly said that actions under it may not seek punitive damages--and of course it says nothing of the kind--that would afford no legitimate basis for any automatic inference that punitive damages are likewise precluded in maintenance and cure cases.

---

[68] *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138 (1928).

[69] The court below rested its erroneous view--that the Jones Act and maintenance and cure remedies are so closely related that Jones Act damages limitations must automatically apply in maintenance and cure actions--on a surprising distortion of *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932). See App. D at D36-D38. *Cortes* arose in the era when wrongful death suits could not lie in the absence of a statute. Justice Cardozo's opinion for the *Cortes* Court explained that the Court was allowing the deceased seaman's family to bring a maintenance and cure suit under the Jones Act solely to avoid having to dismiss the case for lack of a statute. See 287 U.S. at 375-76. The court below turned *Cortes*--a creative decision for the benefit of seamen--into a weapon against seamen.

C. The Court Below Mistakenly Assumed That Punitive Damages Were Not Available to Seamen In the Pre-Jones Act Era.

It is generally accepted that the Jones Act cannot have been intended to restrict seamen's rights.[70] In recognition of that principle, many courts have used a "snapshot in time" analysis whereby any rights that seamen already had when the Jones Act was enacted in 1920 are necessarily still in place.[71] The court below seemed to buy into that viewpoint, stressing that "[u]ntil 1984, we had never upheld an award of punitive damages for the willful nonpayment of maintenance and cure."[72]

The assumption that punitive damages for seaman is a new phenomenon is mistaken. On the contrary, nineteenth century admiralty courts felt free to punish shipowners for abusing seamen, and punitive damages were explicitly regarded as a suitable way to do that. In *The Scotland*, 42

---

[70] See *Miles*, 498 U.S. at 29 ("[t]he Jones Act evinces no general hostility to recovery under maritime law"); *Pacific S.S. Co.*, 278 U.S. at 138-39 ("the [Jones Act] was not intended to restrict in any way the long-established right of a seaman to maintenance, cure and wages--to which it makes no reference"); cf. *The W.L. White*, 25 F. 503, 506 (S.D.N.Y. 1885) ("an act amending the prior law, and designed in part for the benefit of seamen, ought not to be construed to their prejudice any further than its language requires").

[71] See *Anglada v. Tidewater, Inc.*, 752 F.Supp. 722, 724-25 (E.D.La. 1990) (using the "snapshot in time" language and concluding that seamen are still entitled to prejudgment interest); *Anderson*, *supra* note 39, 797 F.Supp. at 536 (describing punitive damages for withholding maintenance and cure as "a firmly rooted general maritime law claim" and holding that the Jones Act does not restrict their availability); *Duplantis*, *supra* note 34, 771 F.Supp. at 788 (using the "point in time" analysis to uphold punitive damages in maritime suits by nonseamen).

[72] App. D at D7.

F. 925, 926 (S.D.N.Y.1890), Judge Addison Brown stated that "no punitive damages should be given" in that particular case because the master's mistakes in treating the wounded seaman were not the product of viciousness but rather mere ineptitude. In *The Vigilant*, 30 F. 288 (S.D.N.Y.1887), Judge Brown awarded compensatory damages of $500 to a seaman who had not been given sufficient medical care and stated:

> Had I not been entirely satisfied of the master's good faith in his conduct, as well as of his intent to treat the seaman kindly and justly, I should have felt bound to add considerably to the sum above named.[73]

The *Scotland* and *Vigilant* cases show that Judge Brown--an admiralty judge of some renown[74]--believed punitive damages were available to seamen in appropriate cases. He was by no means alone in that view. See *Pacific Packing & Navigation Co. v. Fielding*, 136 F. 577, 579-80 (CA9 1905) (stating that when a ship's captain abuses a seaman the employer may be liable for "smart money" or "punitive damages" provided the employer consented to or ratified the captain's conduct); *The Ludlow*, 280 F. 162, 163-64 (N.D.Fla.1922) (reiterating the *Pacific Packing* rule and adding that the captain himself may be liable for "exemplary or punitive" damages for mistreating a seaman); *Nevitt v. Clarke*, 18 F.Cas. 29, 31 (#10,138) (S.D.N.Y.1846) (indicating that seamen may be entitled to "vindictive damages" for having the vessel sold out from under them during a voyage); *The Childe Harold*, 5 F.Cas. 619, 620 (#2,676) (S.D.N.Y.1846) (discussing "punitive" damages for bad food on ship); *Swift v. The Happy Return*, 23 F.Cas.

---

[73] 30 F. at 288.

[74] See, e.g., *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 545 (1960).

560, 561 n.2 (#13,697) (D.Pa.1799) (indicating that the court could craft an appropriate penalty for short rations to seamen living ashore).

Legal systems that countenance punitive damages do so in order to deter the conduct at which such awards are directed. When the threat of punitive damages does its job, actual awards should be relatively rare. They were infrequent in the pre-Jones era, but they did occur. In *The City of Carlisle*, 39 F. 807 (D.Ore.1889), Judge Deady gave a lengthy description of the master's execrable treatment of a seaman after the man was injured on the voyage, summarizing it as "simply inhuman."[75] Judge Deady awarded compensatory damages of $530 for medical expenses, lost wages, and travel from Portland, Oregon, to the seaman's home in England. He then stated:

> *In addition* to this, the libelant must have damages for the *gross neglect and mistreatment* he received after the injury, whereby his injury and suffering were much aggravated. * * * *On the ground of gross neglect and cruel maltreatment* of the libelant since his injury, I estimate and assess the damages of the libelant at $1000.
>
> It may be said that this result is a hardship on the owners ... That may be so, but [the seaman's] is much the harder lot of the two. And if owners do not wish to be mulct in damages for such misconduct, they should be careful to select men worthy to command their vessels and fit to be trusted with the safety and welfare of their crews. . . .[76]

---

[75] 39 F. at 812.

[76] *Id.* at 817; emphasis supplied.

Judge Deady did not use the label punitive damages, but it seems clear that the $1000 award was principally punitive in nature.

There are several similar reported decisions in which courts seemed to award punitive damages without using that term. In *The Troop*, 118 F. 769 (D.Wash.1902), *aff'd*, 128 F. 856 (CA9), *cert. denied sub nom. Kennedy v. Louie*, 195 U.S. 632 (1904), Judge Hanford termed the master's treatment of the injured seaman a "shocking instance of 'man's inhumanity to man'," a failure to observe the dictates of humanity," "cruelty," and a "monstrous wrong."[77] He invoked an analogy from English law's imposition of "a penalty" over and above compensatory damages when a shipowner harmed a seaman through failing to provide proper medications and "antiscorbutics" (scurvy preventatives).[78] Judge Hanford concluded by stating: "Considering all the circumstances of aggravation, I consider the sum of $4,000 to be a reasonable award of damages."[79] The seaman in *Troop* was grievously injured, so that an appropriate award of general compensatory damages might have been fairly high. But in light of Judge Hanford's entire opinion it appears that some part of that $4000 award was punitive.[80]

---

[77] *Id.* at 770-73.

[78] *Id.* at 771.

[79] *Id.* at 773.

[80] For cases in which the punitive component of an innominate award was less clear but still visibly present, see *The Svealand*, 136 F. 109, 110, 112-13 (CA4 1905); *Unica v. United States*, 287 F. 177, 180 (S.D.Ala.1923).

D. The Decision Below May Have Been Driven By A Misplaced Fear of Punitive Damages Rampant.

The opinion below offers no policy justification for precluding punitive damages. But the court's seeming zeal to restrict *Vaughan* and to build a preclusion argument on an aggressive reading of *Miles* makes it reasonable to believe that a driving force may have been the widely shared belief that punitive damages are out of control in America. Nothing could be further from the truth in the maintenance and cure context. Study of the reported decisions since *Vaughan* shows that punitive damage awards have been both infrequent and modest. The highest punitive assessment[81] actually awarded a seaman was $100,000.[82] So few awards have actually occurred that stating a typical range is difficult, but quite a few have been under a thousand dollars, and even

---

[81] A few cases involved significant sums that were either compensatory awards with punitive overtones or undifferentiated blends of compensatory and punitive damages. See *Baker v. Raymond International, Inc.*, 656 F.2d 173 (CA5 1981), *cert. denied*, 456 U.S. 983 (1982) ($370,188 "blend" award by jury vacated by trial judge and left in limbo when court of appeals reversed and remanded on other grounds); *Gaspard v. Taylor Diving & Salvage Co.*, 649 F.2d 372 (CA5 1981), *cert. denied*, 455 U.S. 907 (1982) ($296,240 compensatory award with punitive overtones); *Martin v. G & A Limited*, 604 So.2d 1014 (La.App.), *writ denied*, 607 So.2d 557 (La.1992) ($120,000 compensatory award with punitive overtones); *Paris v. Waterman Steamship Corp.*, 630 N.Y.S.2d 716 (N.Y.App.1995) (reversing a $3.5 million "blend" award). Judge Rubin's relatively recent opinion in *Morales*, *supra* note 42, 829 F.2d at 1360-61, sternly disapproved any mingling of compensatory and punitive damages in future Fifth Circuit cases.

[82] There have been two reported $100,000 awards. *Porche v. Maritime Overseas Corp.*, 550 So.2d 278 (La.App.1989); *Hodges v. Keystone Shipping Co.*, 578 F.Supp. 620 (S.D.Tex.1983).

the significant ones are almost all well below $20,000.[83] In one case a jury awarded $500,000, but the trial judge cut the award in half and the court of appeals took it away altogether.[84] The courts appear completely capable of controlling these awards. And their infrequency suggests that the threat of punitive damages has been doing its intended job.

E. The Decision Below Will Foment Litigation.

This Court's modern decisions on seamen's rights have emphasized that the maritime employer's maintenance and cure duty is "[a]mong the most pervasive incidents of the responsibility anciently imposed upon a shipowner for the health and security of sailors;"[85] that the law of maintenance and cure demands prompt and ungrudging payment by the employer[86] and abhors litigiousness;[87] and that the courts must be zealous "to protect [seamen] from the harsh consequences of arbitrary and unscrupulous actions of their

---

[83] See, e.g., *Rodriguez Alvarez*, *supra* note 24 ($15,140); *Hines*, *supra* note 22 ($10,150); *Robinson*, *supra* note 19 ($10,000). Cf. *Williams*, *supra* note 20 ($49,104 in attorney's fees).

[84] *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87 (CA5 1984).

[85] *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730 (1943).

[86] See *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528 (1938) (stressing the need for a broad maintenance and cure duty in order to achieve the seaman's "prompt restoration to a service whose preservation is in the public interest"); see also *Barnes v. Andover Co.*, 900 F.2d 630, 634 (CA3 1990) (stating that maintenance and cure "must be provided at the onset of the illness or injury and not only after a judicial finding of liability").

[87] See *Farrell v. United States*, 336 U.S. 511, 516 (1949) (praising the law of maintenance and cure as having "few exceptions or conditions to stir contentions, cause delays, and invite litigations").

employers to which, as a class, they are particular exposed."[88] If the decision below is allowed to stand, it will encourage "the unscrupulous employer"[89] to resist its maintenance and cure obligations.

Resistance will be encouraged for two reasons. First, the prospect of occasionally having to pay compensatory damages to a seaman whose illness or injury is aggravated by the delay or denial of maintenance and cure benefits is too remote to have much effect on employer behavior.[90] As Chief Judge Sobeloff noted in his dissent from the court of appeals decision in *Vaughan v. Atkinson*:

> Suits for aggravation of the physical condition can avail in only the limited number of cases where it is possible to demonstrate aggravation. In the vast majority of cases where maintenance benefits are unjustifiably withheld it will be unlikely that such aggravation can be satisfactorily proved or disproved, yet considerable hardship may have been inflicted on the sick or injured seaman.[91]

Second, the narrow penalty to which the court below reduced *Vaughan* is too feeble a threat. The court below laid great emphasis on its view that the "bad-faith abuse of litigation" penalty for which *Vaughan* in its view now stands

---

[88] *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 572 (1983) (quoting *Collie v. Fergusson*, 281 U.S. 52, 55 (1930)).

[89] *Weason*, *supra* note 23, 706 P.2d at 310.

[90] See the Sterbcow affidavit, App. G at G1-G3.

[91] 291 F.2d 813, 816 n.2 (CA4 1961) (Sobeloff, C.J., dissenting), *rev'd*, 369 U.S. 527 (1962).

cannot reach "pre-litigation conduct."[92] It cannot be used to punish "the underlying conduct that gave rise to the litigation."[93] According to *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991)--a decision that the court below relied upon extensively--the abuse-of-litigation penalty stems from "the inherent power of the federal courts,"[94] must be applied "with restraint and discretion,"[95] and is based on the court's need to protect *itself* and its processes from abuse.[96]

---

[92]App. D at D14. See also D12 ("*Vaughan* has come to stand for ...attorney's fees [for] ... bad-faith conduct during litigation"); D14 (this penalty does not "punish the conduct giving rise to a plaintiff's claim"); *id.* (the penalty's focus is "how the parties conduct themselves *during the litigation*") (Fifth Circuit's emphasis); D15 ("punitive damages are awarded on the basis of the merits of a case, while bad-faith fee-shifting punishes abuses of the litigation process"); D16 ("the punitive aspect of the *Vaughan* award is the bad-faith exception to the American Rule, and that exception is limited to a recovery of attorney's fees. The *Vaughan* award was clearly *not* a punitive damages award in the tort sense of punishing the underlying conduct that gave rise to the litigation") (emphasis in original).

[93]App D at D16. To avoid any possible confusion, an obvious point needs to be made here. In the present context "the underlying conduct that gave rise to the litigation" means the denial of maintenance and cure, not the conduct that may have caused the original injury or illness. Suits for maintenance and cure need not allege that the defendant had anything to do with the original injury or illness. See, e.g., *Warren v. United States*, 340 U.S. 523 (1951).

[94]501 U.S. at 43.

[95]*Id.* at 44. See also *id.* at 47 ("narrow exceptions to the American Rule effectively limit a court's inherent power to impose attorney's fees"); *id.* at 50 ("[a] court must, of course, exercise caution in invoking its inherent power").

[96]See *id.* at 44 (discussing judicial power to prevent fraud's being "perpetrated upon the court"); *id.* at 46 (emphasizing "a court's inherent power to police itself, thus serving the dual purpose of 'vindicat[ing] judicial authority ...and making the prevailing party whole for expenses

Unscrupulous employers who have even minimal faith in their lawyers' skills will not feel much threatened by so narrowly focused a penalty. It will virtually never be assessed except for unusually obstreperous and long-term defiance of judicial authority. And it can always be avoided entirely by caving in the minute that suit is filed. Thus, the penalty envisaged by the court below seems more likely to encourage than to reduce litigation. It is so limited that it will effectively condone employer resistance. *And*--since there is no prospect of its ever being assessed for pre-litigation resistance--it will force seamen's counsel to rush to court to file suit.

A penalty that "may not be used to sanction prelitigation conduct"[97] is a perverse intrusion into a specialized body of law that has avidly sought to avoid litigation. As this Court stated in *Vella v. Ford Motor Co.*, 421 U.S. 1, 3-4 (1975):

> The shipowner's ancient duty to provide maintenance and cure for the seaman who becomes ill or is injured while in the service of the ship derives from the "unique hazards [which] attend the work of seamen," and fosters the "combined object of encouraging maritime commerce and assuring the well-being of seamen." The breadth and inclusiveness of the shipowner's duty assures its easy and ready administration, for "[i]t has few exceptions or conditions to stir contentions, cause delays, and invite litigations."[98]

---

caused by his opponent's obstinacy'") (quoting *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978)); *id.* at 47 (discussing an attorney's fees sanction for "willful disobedience of a court's orders").

[97] App. D at D14.

[98] 421 U.S. at 3-4. Citations omitted.

In both its spirit and its expected real-world impact, the decision below is *Vella's* antithesis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David W. Robertson
Counsel of Record
727 East 26th Street
Austin, Texas 78705
(512) 471-1124

Dennis M. McElwee
Schechter & Marshall, L.L.P.
3200 Travis
Houston, Texas 77006
(713) 757-7811

APPENDIX A

DISTRICT COURT JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

DOMINGO GUEVARA	§	
	§	
VS.	§	C.A. No. 1:91-CV0222
	§	
MARITIME OVERSEAS	§	
CORPORATION	§	

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Howell Cobb, District Judge, presiding, and the Court having instructed the jury to find a verdict and also to make answer to certain Interrogatories, and the jury having duly rendered a verdict having made answers to said Interrogatories as follows:

INTERROGATORY NO. 1

Do you find from a preponderance of the evidence that defendant, Maritime Overseas Corporation, was negligent and that such negligence, if any, was a proximate cause, as defined, of plaintiff Domingo Guevara's injuries?

Answer "We do," or "We do not."

ANSWER: We do.

INTERROGATORY NO. 2

Do you find from a preponderance of the evidence that the vessel OVERSEAS PHILADELPHIA was unseaworthy and that such unseaworthiness, if any, was a proximate cause of plaintiff Domingo Guevara's injuries?

Answer "We do," or "We do not."

ANSWER: We do.

Do not answer Interrogatory No. 3 if you have answered "We do not" to each of the above interrogatories.

INTERROGATORY NO. 3

Do you find from a preponderance of the evidence that plaintiff Domingo Guevara was contributorily negligent, and that such negligence, if any, was a proximate cause of plaintiff's injuries?

Answer "We do," or "We do not."

ANSWER: We do not.

Do not answer Interrogatory No. 4 unless you have answered Interrogatory No. 3, "We do."

INTERROGATORY NO. 4

With respect to each cause which you have found to have contributed to plaintiff's injuries, you will need to find from a preponderance of the evidence the respective percentages by which each party contributed to the injuries.

Answer by stating the percentage of contribution opposite each name to the extent that each contributed to plaintiff's injuries. The total must equal 100%.

Maritime Overseas Corporation _____%

Domingo Guevara _____%

TOTAL 100%

Do not answer Interrogatory No. 5 unless you have answered either Interrogatory No. 1 or Interrogatory No. 2 "We do."

INTERROGATORY NO. 5

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate plaintiff for his injuries which you find from a preponderance of the evidence resulted only from the accident in question?

Consider the following elements, if applicable, and none others:

(a) Lost earnings from the date of injury until trial;

(b) Lost earning capacity from date of trial for the future;

(c) Physical pain and mental anguish, past and future;

(d) Value to compensate for physical impairment and loss of ability to engage in pleasurable pursuits, past and future;

Answer in dollars and cents, if applicable.

PAST DAMAGES	$ 28,000.00
FUTURE DAMAGES	$103,000.00

INTERROGATORY NO. 6

Do you find that the defendant, Maritime Overseas Corporation, arbitrarily and capriciously failed to provide maintenance to the plaintiff, Domingo Guevara on a timely basis?

ANSWER: "We do," or "We do not."

ANSWER: We do.

INTERROGATORY NO. 7

If you have answered Interrogatory No. 6 "We do," what sum of money do you find from a preponderance of the evidence should be awarded to the plaintiff as punitive damages, as that term has been defined in this charge?

Answer in dollars and cents, if any.

ANSWER: $60,000.00

IT IS ORDERED and ADJUDGED that the Plaintiff, Domingo Guevara, recover of the Defendant, Maritime Overseas Corporation, the sum of One Hundred Ninety One Thousand Dollars ($191,000.00) and post-judgment interest at the rate provided by law, and his costs of Court.

By stipulation of the parties, the Court heard evidence adduced by the parties with regard to increasing the amount of maintenance from the contracted $8.00 a day to a level reflecting the actual cost of maintaining the Plaintiff during his period of convalescence. The Court having heard the evidence and having reviewed the briefs submitted by the parties finds that the Plaintiff, Domingo Guevara, is entitled to $ 0 dollars per day increase in the daily maintenance rate.

It is therefore, ORDERED and ADJUDGED that the Plaintiff, Domingo Guevara, recover of the Defendant, Maritime Overseas Corporation, the sum of $ 0 dollars as additional maintenance with post-judgment interest thereon at the legal rate as provided by law and his costs of Court.

Dated at Beaumont, Texas, this 29th day of April, 1992.

S/
UNITED STATES DISTRICT JUDGE

APPENDIX B

OPINION OF FIFTH CIRCUIT

SEPTEMBER 30, 1994

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No.92-4711

DOMINGO GUEVARA,

Plaintiff-Appellee,

VERSUS

MARITIME OVERSEAS CORPORATION,

Defendant-Appellant

Appeal from the United States
District Court For the
Eastern District of Texas

(Filed Sept. 30, 1994)

Before GOLDBERG, GARWOOD and WEINER, Circuit Judges.

Injured seaman sought recovery of damages under Jones Act. The United States District Court for the Eastern District of Texas, Howell Cobb, J., 792 F.Supp. 520, awarded damages under Jones Act and punitive damages for shipowners failure to timely pay maintenance and cure. Shipowner appealed. The Court of Appeals held that: (1) record supported jury finding that shipowner was negligent; (2) shipowner failed to timely pay maintenance and cure and, thus, was liable for punitive damages; and (3) punitive damages are available in maintenance and cure cases.

Affirmed.

Garwood, Circuit Judge, filed a concurring opinion.

PER CURIAM:

In this case we uphold an injured seaman's recovery of damages under the Jones Act. Fifth Circuit precedent also compels us to uphold an award of punitive damages for the shipowner's failure to timely pay maintenance and cure.

I.

Facts and Proceedings Below

Plaintiff-appellee Domingo Guevara (Guevara) was

injured on May 29, 1990, while serving as a member of the crew on the vessel OVERSEAS PHILADELPHIA, owned and operated by Guevara's employer, defendant-appellant Maritime Overseas Corporation (Maritime). The crew was preparing the ship to sail from Freeport, Texas, and Guevara was helping to secure the gangway, the size of which required that it be lifted by the ship's crane. The task was being performed in the midst of considerable wind and rain. Guevara was standing on a catwalk on the vessel pursuant to the orders of the vessel's bosun, Guevara's superior, who was operating the crane. As the gangway was lifted, it swayed in Guevara's direction and the bosun ordered him to move away from where he was standing. But when Guevara tried to move, he momentarily caught the tread of his boot in the catwalk grating. Freeing himself, Guevara jumped from the catwalk to the deck below to avoid being hit by the gangway.

Guevara injured his knee in the fall. He promptly reported his injury to the third mate and was given assistance. Despite his injury, Guevara continued to work on the vessel (apparently to qualify for union benefits) for a period of four months. Upon the vessel's return to port, Guevara saw a doctor who diagnosed him as having a torn medial meniscus and a torn anterior cruciate ligament. Although initially Guevara was reluctant to undergo surgery, his knee was operated on in February 1991.

[1] Guevara, through his attorney, made a number of formal demands on Maritime for maintenance and cure

beginning on February 5, 1991.[1] Maritime, however, made no payment until at least June 24, 1991. Despite subsequent demands, Guevara did not receive his second and final payment until December 29, 1991.

Guevara brought a negligence claim under the Jones Act, 46 U.S.C.App. § 688, and an unseaworthiness claim under general maritime law, against Maritime. He also sought punitive damages for Maritime's failure to pay maintenance and cure on a timely basis. The jury returned a verdict in Guevara's favor, finding Maritime negligent, the OVERSEAS PHILADELPHIA unseaworthy, and Guevara not negligent. The jury awarded Guevara $131,000 in compensatory damages for his May 29, 1990, injury, and $60,000 in punitive damages for Maritime's arbitrary and capricious failure to pay maintenance and cure. Maritime now appeals.

II.

Discussion

A.

[2] Maritime argues that the district court erred in denying its motions for judgment notwithstanding the verdict on Guevara's negligence and unseaworthiness claims. Maritime also challenges the jury's award of punitive damages for Maritime's failure to pay

---

[1] "Maintenance and cure" refers to a shipowner's ancient obligation to provide compensation (now often at the rate of $8.00 a day) and medical care to an ill or injured seamen until he has reached the point of "maximum recovery."

maintenance and cure. We first consider whether there is sufficient evidence to support the jury's finding that Maritime was negligent. In this regard, Maritime is obliged to swim upstream against a fast current because the standard of review to be applied to a jury verdict in a Jones Act case is highly deferential. The jury's verdict must stand unless there is a complete absence of probative facts to support it. *See, e.g., Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 266 n. 9 (5th Cir.1991).

[3] There is enough evidence in the record to meet this lenient standard. Guevara's theory of liability is that he had been standing on the catwalk at the direction of the bosun, who then lifted the gangway without first making sure that he (Guevara) was in a safe position. The captain of the vessel testified that the bosun is to blame if he performs such an operation without first ascertaining that none of his men are in harm's way.[2]

---

[2] "Q. And the bosun should make sure that his men are properly positioned before he allows the crane to lift up, correct, so nobody gets hurt?

A. Yes.

Q. And if someone is in harm's way, the bosun should stop the operation, correct?

A. Yes.

Q. And if someone is in harm's way, the bosun should stop the operation, correct?

A. Yes.

Q. And if the bosun doesn't stop the operation,

The jury could have concluded from this testimony that the bosun, and hence Maritime as his employer, was negligent. Because we uphold the jury's finding that Maritime was negligent and therefore liable under the Jones Act, we need not decide whether the jury correctly found Maritime's vessel to be unseaworthy under the general maritime law.[3]

B.

We now turn to Maritime's challenge to the jury's award of punitive damages to Guevara. Maritime argues, first, that *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), bars the recovery of punitive damages for failure to pay maintenance and cure, and, second, that even if punitive damages are available in such circumstances, a reasonable jury could not have concluded that Maritime acted in an arbitrary and capricious manner. We will discuss the second issue first.

> [4-6] Under the law of this Circuit, a shipowner who refuses to pay maintenance and cure is subject to "an escalating scale of liability: a shipowner who is in fact liable for maintenance and cure, but who

---

> it's the bosun's fault that the man gets hurt, correct?
>
> A. Yes."

[3] The single finding of compensatory damages was not allocated or divided as between damages due to negligence and those due to unseaworthiness, nor was there any objection to the form of the charge or verdict in this respect; and, indeed, the evidence does not suggest any basis for such a division.

> has been reasonable in denying liability, may be held liable only for the amount of maintenance and cure. If the shipowner has refused to pay without a reasonable defense, he becomes liable in addition for compensatory damages. If the owner not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, he becomes liable for punitive damages and attorney's fees." *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir.1987).

A shipowner becomes liable for punitive damages when its refusal to pay maintenance can be described as callous and recalcitrant, arbitrary and capricious, or willful, callous, and persistent. *See id.* In this case, the jury answered yes to the question whether Maritime "arbitrarily and capriciously failed to provide maintenance to the plaintiff, Domingo Guevara on a timely basis?" and awarded $60,000 in punitive damages.[4] A reasonable jury could have so concluded.

The parties stipulated that Guevara's attorney made formal demands for maintenance by letter on six occasions: February 5, 1991; February 26, 1991; April 4, 1991; June 7, 1991; August 21, 1991; and January 31, 1992. Maritime's first payment, for $448, was not received by Guevara until sometime after June 24, 1991.[5]

---

[4] The jury was not asked to award attorneys' fees or compensatory damages on account of Maritime's failure to pay maintenance and cure.

[5] The record is unclear as to when Guevara actually received this payment; the date on the check was June 24, 1991.

Maritime's second payment, for $1,344, was not received by Guevara until December 29, 1991. Guevara argues that, because nearly five months passed between his initial demand and Maritime's first payment, there is adequate support for the jury's verdict. Maritime correctly argues that it was entitled to a reasonable period of time in which to investigate the legitimacy of Guevara's claim. *See McWilliams v. Texaco, Inc.*, 781 F.2d 514, 519 (5th Cir.1986) ("Where doubt exists . . . a vessel owner may request reasonable documentation from a seaman before it commences payment of maintenance that may prove both lengthy and expensive"). However, that excuse is unavailable where a shipowner is guilty of "laxness in investigating a claim that would have been found to be meritorious." *Breese v. AWI, Inc.*, 823 F.2d 100, 104 (5th Cir.1987). In *McWilliams*, the shipowner withheld maintenance payments until it received medical documentation of the seaman's claim; after receiving such documentation, the shipowner commenced payments "shortly thereafter." 781 F.2d at 519. Here, the medical records compiled by the physician treating Guevara's injury were forwarded to Maritime along with Guevara's injury were forwarded to Maritime along with Guevara's February 5, 1991, and March 4, 1991, demands for maintenance, yet Maritime made no payment until several months later. In any event, even if the delay between Guevara's first demand and Maritime's first payment could be explained as a reasonable investigatory period, the jury was entitled to conclude that the six-month delay between Maritime's first payment and its second payment, received by Guevara practically on the eve of trial, could not. Under the facts here, since Maritime had commenced payment, the jury could properly find that the second delay could not be explained as time needed to investigate

Guevara's claim.[6] Thus, the record supports the jury's award of punitive damages under the prevailing law of this Circuit.

C.

Maritime also argues that Guevara's recovery of punitive damages is barred by the Supreme Court's decision in *Miles*. There, the parents of a seaman killed by a fellow crew member sought to recover damages for loss of society under general maritime law in a cause of action for unseaworthiness. A unanimous Court held that, although the wrongful death of a seaman is actionable under general maritime law, damages recoverable in such actions do not include loss of society. The second of these two holdings is of principal concern here, although the Court's analytical methodology was the same for each. Following the course first set by *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), the *Miles* Court tackled the question of the availability of remedies for wrongful death under general maritime law by seeking guidance from comparable federal statutes.

> "We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these

---

[6] The evidence was not such as to compellingly show any legitimate reason for the long delay after June 24.

> legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress." *Miles*, 498 U.S. at 27, 111 S.Ct. at 323.

Then observing that neither the Jones Act nor the Death on the High Seas Act (DOHSA), 46 U.S.C.App. § 761, permits the recovery of nonpecuniary losses, such as loss of society, the *Miles* Court stated:

> "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 32-33, 111 S.Ct. at 326.

The Court stressed the value of establishing a uniform rule of damages applicable to the Jones Act, DOHSA, and general maritime law. *See id.*

Maritime's argument that *Miles* abrogates this Circuit's rule permitting the recover of punitive damages in maintenance and cure cases obviously cannot rest upon the specific holding in *Miles* - that damages for loss of society are not recoverable in a general maritime cause of action for wrongful death. *Miles* did not involve

maintenance and cure or punitive damages.[7] Of course, it could be that the logic if not the holding of *Miles* supports Maritime's argument. In the wake of *Miles*, in fact, four appellate courts have held that punitive damages now are unavailable under general maritime law. *See Horsley v. Mobil Oil Co.*, 15 F.3d 200 (1st Cir. 1994); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1454-59 (6th Cir.1993); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294 (Tex.1993) (per curiam); *Sky Cruises, Ltd. v. Andersen*, 592 So.2d 756 (Fla.App.) (per curiam), *rev. denied*, 610 So.2d 551 (Fla.), *cert. denied*, _ U.S. _, 113 S.Ct. 466, 121 L.Ed.2d 374 (1992).[8] However, in each of

---

[7] That *Miles* involved a claim for wrongful death whereas Guevara's injury was nonfatal is not a relevant distinction. We have already held that *Miles* bars recovery of nonpecuniary losses in general maritime actions alleging personal injury. *See Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127, 129-30 (5th Cir.), *cert. denied*, _ U.S. _, 113 S.Ct. 190, 121 L.Ed.2d 134 (1992) (Injured seaman; loss of society); *Michel v. Total Transp., Inc.*, 957 F.2d 186, 191 (5th Cir.1992) (injured seaman; loss of consortium); *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119, 122 (5th Cir.1994) (longshoreman injured on high seas; loss of consortium); *accord Smith v. Trinidad Corp.*, 992 F.2d 996, 996 (9th Cir.1993) (per curiam) (agreeing with *Murray*); *Horsley v. Mobil Oil Co.*, 15 F.3d 200 (1st Cir.1994) (injured seaman; loss of society).

[8] A number of federal district courts have reached the same conclusion. *See, e.g., Ellison v. Messerschmitt-Bolkow-Blohm*, 807 F.Supp. 39, 41 (E.D.Tex.1992); *La Voie v. Kualoa Ranch & Activity Club, Inc.*, 797 F.Supp. 827, 829-31 (D.Hawaii 1992); *In re Waterman Steamship Corp.*, 780 F.Supp. 1093, 1095-96 (E.D.La. 1992); *In re Cleveland Tankers, Inc.*, 791 F.Supp. 679, 682 (E.D.Mich. 1992); *In re Aleutian Enter. Ltd.*, 777 F.Supp. 793, 796 (W.D.Wash. 1991); *Haltom v. Lykes Bros. Steamship Co.*, 771 F.Supp. 179, 181 (E.D.Tex.1991); *In re Mardoc Asbestos Case Clusters*, 768 F.Supp. 595, 599-600

these cases, plaintiff's claim for punitive damages was not based upon a cause of action for maintenance and cure. In another line of cases, several federal district courts have held that *Miles* does *not* preclude recovery of punitive damages for failure to pay maintenance and cure.[9] In contrast we have found only one court which has held that *Miles* bars recovery of punitive damages in maintenance and cure cases. *See Gray v. Texaco, Inc.*, 610 So.2d 1090, 1096 (La.App.), cert. denied, 616 So.2d 686 (La. 1993).

[7, 8] The courts which have held that punitive damages are unavailable in a cause of action for unseaworthiness have reasoned that, because punitive damages are unavailable under either the Jones Act or DOHSA,[10] it would run counter to *Miles* to allow punitive

---

(E.D.Mich.1991); *Rollins v. Peterson Builders, Inc.*, 761 F.Supp. 943, 949-50 (D.R.I.1991).

[9] *See, e.g., Ridenour v. Holland America Lines Westours, Inc.*, 806 F.Supp. 910 (W.D.Wash.1992); *Anderson v. Texaco, Inc.*, 797 F.Supp. 531, 536 (E.D.La.1992); *Ortega V. Oceantrawl, Inc.*, 822 F.Supp. 621, 623-24 (D.Alaska 1992); *Howard v. Atlantic Pacific Marine Corp.*, 1992 WL 55487, at *2, 1992 U.S.Dist. Lexis 2474, at *4-5 (E.D.La. Feb. 28, 1992); *Bachu v. Int'l Marine Terminals*, 1991 WL 211519, at *1, 1991 U.S.Dist. Lexis 14485, at *3, (E.D.La. Sept. 26, 1991); *Rowan Companies, Inc. v. Badeaux*, 1991 WL 175541, at *2, 1991 U.S.Dist. Lexis 12355, at *4 (E.D.La. Aug. 28, 1991); *Collinsworth v. Oceanic Fleet, Inc.*, 1991 WL 165732, at *3, 1991 U.S.Dist. Lexis 11759, at *9-10 (E.D.La. Aug. 19, 1991); *Odeco, Inc. v. Cornish*, 1991 WL 148746, *2, 1991 U.S.Dist. Lexis 10827, at *4 (E.D.La. July 22, 1991).

[10] Only pecuniary damages are available under the Jones Act and DOHSA. *See Miles*, 498 U.S. at 30-32, 111 S.Ct. at 325 (Jones Act); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 621-23, 98 S.Ct. 2010, 2013, 56 L.Ed.2d 581 (1978) (DOHSA). Punitive damages are

damages under general maritime law. While there is great force to this argument, it is arguably not controlling in the context of maintenance and cure. Essentially a form of workers' compensation-like employee benefit, maintenance and cure has no counterpart in either the Jones Act or DOHSA.

A panel of this Court may overrule the existing law in the circuit if an intervening Supreme Court decision so requires. The implication of *Miles*, however, are not so direct as to allow this panel to depart from the Court's previous decisions that punitive damages are available in maintenance and cure cases.

Conclusion

The jury's verdict is adequately supported by the evidence, and the judgment thereon is supported by applicable precedent in this Circuit. Accordingly, the district court's judgment is

AFFIRMED.

GARWOOD, Circuit Judge, concurring:

I fully join the Court's opinion, and append this separate writing merely to urge that the en banc court

---

nonpecuniary and are therefore unavailable under either Act. *See Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-61 (9th Cir.1984), *cert. denied*, 471 U.S. 1136, 105 S.Ct. 2677, 86 L.Ed.2d 696 (1985). *See also Horsley v. Mobil Oil Co.*, 15 F.3d 200, 203 (1st Cir.1994); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir.1993).

reexamine the availability of general punitive damages in maintenance and cure cases, particularly in light of the Supreme Court's opinion in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). That issue is squarely presented in this case.

In my view, *Miles* seriously calls into question the availability of punitive damages for nonpayment of maintenance and cure. If the First and Sixth Circuits, the Texas Supreme Court, and all the rest of the courts that have considered the matter, are correct that *Miles* bars recovery of punitive damages in a cause of action for unseaworthiness,[1] as I believe they are, then this Court en banc should seriously rethink its previous panel decisions allowing punitive damages in maintenance and cure cases. See *Gray v. Texaco, Inc.*, 610 So.2d 1090, 1096 (La.App.), *cert. denied*, 616 So.2d 686 (La.1993).

Both unseaworthiness and maintenance and cure are doctrines of general maritime law, and in the past we have looked to the availability of punitive damages under the one when deciding whether they are available under the other. In *In re Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir.1981), we cited a First Circuit case allowing punitive damages in maintenance and cure actions in support of our holding that punitive damages are recoverable in unseaworthiness actions. Thus, it would be highly anomalous to allow punitive damages in the context of the contract-like maintenance and cure claims if such damages are unavailable in the context of the tort-like

---

[1] See our *per curiam* herein, note 8 and accompanying citations in text. See also, *id.* note 7 and note 10 and accompanying text.

unseaworthiness claims.[2]

Furthermore, even though the Jones Act and DOHSA may not be closely analogous reference points in the *Miles* analysis with respect to maintenance and cure, the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, may be. It has been

---

[2] Punitive damages are generally unavailable for breach of contract. *See* Restatement (Second) of Contracts § 355 (1979); 11 *Williston on Contracts* § 1340, at 209-11 (W.Jaeger 3d ed. 1968); 5 *Corbin on Contracts* § 1077, at 438-39 (1964). That the duty to pay maintenance and cure derives from contract was first stated by Justice Story in *Harden v. Gordon*, 11 Fed.Cas. 480, 482 (C.C.D.Me. 1823) (No. 6,047). *Accord Brister v. AWI, Inc.*, 946 F.2d 350, 360 (5th Cir.1991) (Maintenance and cure "is implied in the employment contract between seaman and shipowner."); 2M. Norris, *The Law of Seaman* § 26:2, at 3 (4th ed. 1985) ("Maintenance and cure is a contractual form of compensation given by the general maritime law."). To be sure, the contract analogy has its limits. In *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962), Justice Douglas stated that "[m]aintenance and cure differs from rights normally classified as contractual," *id.* at 532, 82 S.Ct. at 1000, and then quoted Justice Cardozo: "Contractual it is in the sense that it has its source in a relation which is contractual in origin, but, given the relation, no agreement is competent to abrogate the incident." *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 371, 53 S.Ct. 173, 174, 77 L.Ed. 368 (1932). Yet just because a shipowner's obligation to pay maintenance and cure cannot "be abrogated by a contractual provision," *Dowdle v. Offshore Express, Inc.*, 809 F.2d 259, 262 (5th Cir.1987), does not mean that none of the rules of contract law pertain to maintenance and cure. It has been held, for example, that the rate of maintenance and cure may be set in a collective bargaining agreement. *See Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 948 (9th Cir.), *cert. denied*, 479 U.S. 924, 107 S.Ct. 331, 93 L.Ed.2d 303 (1986). In sum, to the extent that the obligation to pay maintenance and cure is contractual in nature, allowing punitive damages for a breach thereof is anomalous.

said that maintenance and cure "is to the seaman almost what workmen's compensation is to the land worker." 2 M. Norris, *The Law of Seaman* § 26:1, at 3 (4th ed. 1985). The LHWCA, meanwhile, "creates a worker's compensation scheme for certain maritime workers which is exclusive of other remedies and does not provide for punitive damages." *Miller*, 989 F.2d at 1457; *see* 33 U.S.C. § 905 (exclusiveness of LHWCA remedies). Generally workers' compensation schemes, whether state or federal, for seaman or land lubbers, do not permit injured workers to recover punitive damages. *See* 2A A. Larson, *The Law of Workmen's Compensation* § 65.37, at 12-36 (1987) ("punitive damages are of course not recoverable under a workers' compensation act"). *See also Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808, 813-14 (5th Cir.1988).

Before examining the genesis of this Court's relevant jurisprudence, it will be helpful to provide an overview of the law in this area among the other circuits. In addition to the Fifth, the First, Second, and Eleventh Circuits have held (prior to *Miles*) that punitive damages are recoverable for nonpayment of maintenance and cure. *See Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir.1973); *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412 (2d Cir.1978); *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir.1987) (per curiam). In the Second Circuit, however, recovery is limited to the amount of attorneys' fees. *Kraljic*. The law in the Sixth[3] and Ninth[4] Circuits

---

[3] Relying on dicta in *Al-Zawkari v. American Steamship Co.*, 871 F.2d 585, 590 n. 8 (6th Cir.1989), one district court in the Sixth Circuit has held that "a claim for punitive damages under the doctrine of maintenance and cure is recognizable in this circuit." *Hoeffling v. United States Steel*, 792 F.Supp. 1029, 1030 (E.D.Mich.1991). Another

is unclear. The other circuits have no law.

Although the right to maintenance and cure "stems from the ancient sea codes of the Middle Ages," 2 Norris, *supra* § 26:2, at 4-5, this Court had never upheld an award of punitive damages for nonpayment of maintenance and cure until 1984. *See Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir.1984). *See also McWilliams v. Texaco*, 781 F.2d 514, 519 & n. 11 (5th Cir.1986). *Holmes* deals with the issue in only an abbreviated fashion, the extent of *Holmes'* analysis being as follows:

---

district court in that Circuit has said that a seaman may recover "an award of punitive damages *limited to attorney's fees*." *Owens v. Conticarriers & Terminals, Inc.*, 591 F.Supp. 777, 792 (W.D.Tenn.1984) (original emphasis). Still another has suggested that they are not recoverable at all. *See Mardoc Asbestos Case Clusters, supra*, 768 F.Supp. at 600 n. 1. As noted, the Sixth Circuit held recently that general maritime law does not allow recovery of punitive damages in a cause of action for unseaworthiness. *See Miller, supra. Miller*, however, did not specifically discuss maintenance and cure claims.

[4] In *Sample v. Johnson*, 771 F.2d 1335, 1347 n. 12 (9th Cir.1985), *cert. denied*, 475 U.S. 1019, 106 S.Ct. 1206, 89 L.Ed.2d 319 (1986), the Ninth Circuit stated in dicta that "[p]unitive damages are awardable, in some circumstances to a seaman where payment for maintenance and cure is wrongly denied." Relying in part on *Sample*, two district courts in the Ninth Circuit have held that punitive damages are available. *See Ridenour, supra*, 806 F.Supp. at 911-13; *Nelson v. Research Corp.*, 805 F.Supp. 837, 854 (D.Hawaii 1992)(dicta). Another district court, however, reached the opposite conclusion. *See La Voie, supra*, 797 F.Supp. at 831-32. *Ridenour* and *La Voie*, while reaching different conclusions, agreed that there is no Ninth Circuit case dispositive of the issue.

> "In *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962), the Supreme Court held that an employer's willful and arbitrary refusal to pay maintenance and cure gives rise to a claim for damages in the form of attorneys' fees in addition to the claim for general damages. Subsequent decisions have established that, in addition to such attorneys' fees, punitive damages for such refusal are available under the general maritime law. *See Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir.1981) (collecting cases); *see also Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir.1973)." *Holmes*, 734 F.2d at 1118.

Thus, *Holmes* relied exclusively upon three cases: the Supreme Court's *Vaughan*, this Court's *Merry Shipping*, and the First Circuit's *Pocahontas*. None of these cases, however, provides significant support for the rule announced in *Holmes*.

In *Vaughan*, the Supreme Court upheld an award of attorneys' fees where the shipowner had deliberately withheld maintenance and cure. The rationale underlying *Vaughan*'s holding is subject to considerable debate and we will discuss it at greater length later on. For now, it is enough to know this: *Vaughan* upheld an award of attorneys' fees, not punitive damages, and therefore does not directly support the holding of *Holmes*. *See* Reinschreiber, *Punitive Damages in Admiralty for Bad Faith Refusal to Provide Maintenance and Cure*, 15 San Diego L.Rev. 309, 313 (1978) ("the *Vaughan* decision affords no new basis for recovery of punitive damages"). Nor did *Holmes* dispute this fact; it said that, after *Vaughan*,

subsequent decisions made punitive damages available.

The second case cited by *Holmes*, and the one upon which it seems to rely most heavily, is *Merry Shipping*. Like *Vaughan*, however, *Merry Shipping* does not squarely support the *Holmes* rule. *Merry Shipping* upheld an award of punitive damages for the wrongful death of a seaman in a cause of action for *unseaworthiness*. In support of its holding, *Merry Shipping* approvingly cited the First Circuit's *Pocahontas* decision, which, in the words of *Merry Shipping*, "upheld an award of punitive damages for a shipowner's willful and callous withholding of a seaman's maintenance and cure." 650 F.2d at 625. Yet this endorsement of the holding in *Pocahontas* is clearly dictum since *Merry Shipping* did not involve maintenance and cure. As one commentator has noted, "The *Holmes* Court's authority for allowing an award of punitive damages is not readily apparent, because maintenance and cure was not at issue in *Merry Shipping*." Davis, *Punitive Damages for Maintenance and Cure*, 10 Mar.Law. 103, 108 (1985).

Furthermore, when one looks back on *Merry Shipping* with the benefit of *Miles*, it becomes clear that *Merry Shipping* is doubtful authority at best. The holding of *Merry Shipping* - that punitive damages are available under general maritime law - rested upon two assumptions, both of which were capsized by *Miles*. First, *Merry Shipping* stated that nonpecuniary losses are recoverable under general maritime law. *See* 650 F.2d at 626. That proposition, of course, was squarely rejected in *Miles*. *See* 498 U.S. at 30-32, 111 S.Ct. at 325. Second, *Merry Shipping* argued that the unavailability of punitive damages under the Jones Act does not compel their

unavailability under general maritime law. *See* 650 F.2d at 626. That reasoning, however, is flatly inconsistent with *Miles*' insistence upon uniformity in the availability of damages under general maritime law and statutes such as the Jones Act. *See* 498 U.S. at 27-29, 30-32, 111 S.Ct. at 323, 325. Thus, because of *Miles*, it would appear that *Merry Shipping* is no longer good law.

The last case cited by *Holmes* is the First Circuit's *Pocahontas* decision. To be sure, that case did squarely hold that punitive damages are available in maintenance and cure cases, and it was favorably cited in *Merry Shipping*. *Pocahontas*, however, suffers from the fact that it relied upon the *dissent* in *Vaughan*. *See Pocahontas*, 477 F.2d at 1051. As the Second Circuit pointed out in its *Kraljic* opinion:

> "The [*Pocahontas*] court justified the punitive damage award primarily by relying on Mr. Justice Stewart's dissenting opinion in [*Vaughan v.] Atkinson* which, as we have indicated, would have awarded exemplary damages under traditional concepts not necessarily limited to the amount of counsel fees. The obvious difficulty with this approach is that the court followed the views of the dissenters in *Atkinson* and not the majority." *Kraljic*, 575 F.2d at 415.

Holmes made no mention of *Kraljic*, even though it was decided six years earlier. In *Kraljic*, the Second Circuit held that willful nonpayment of maintenance and cure entitles a seaman to recover punitive damages *limited to the amount of attorneys' fees*. The *Kraljic* court stated:

> "The [*Pocahontas*] court, we believe, correctly perceived that both majority and minority opinions in *Atkinson* in essence found that punitive damages were awardable in maintenance and cure cases. The inescapable fact is, however, that the majority opinion in *Atkinson* limited that recovery to counsel fees despite the explicit view of the dissenters that no such curb be imposed." *Id.* at 415-16.

Finally, a brief word is in order about the Eleventh Circuit's *Hines* case, which was decided three years after *Holmes*. Recognizing that on the question of the availability of punitive damages, "*Vaughan* is not dispositive because in that case only a claim for attorney's fees was asserted," *Hines*, 820 F.2d at 1189, the *Hines* court choose (sic) to "[f]ollow[ ] the guidance of *Merry Shipping*", *id.*, and allow punitive damages in maintenance and cure cases. Again, however, *Merry Shipping* is questionable authority at best.[5]

To sum up, the cases that *Holmes* relied upon cannot now support the result in *Holmes*. *Vaughan* awarded attorneys' fees, not punitive damages; *Merry Shipping* did not involve maintenance and cure and has probably been overruled by *Miles*; and *Pocahontas* was based upon the *Vaughan* dissent. Of the cases that *Holmes* did not cite, *Kraljic* limits punitive damages to the amount of attorneys' fees and *Hines* relied upon the now-dubious *Merry Shipping*. In arguable support of *Holmes*,

---

[5] Two of the judges on the *Hines* panel were on the pre-split Fifth Circuit panel in *Merry Shipping*, which was authored by one of them. *Hines* was a *per curiam*.

there is one remaining possibility that should be considered, namely, that *Vaughan*, while only upholding an award of attorneys' fees, announced a principle broader than its result. *Vaughan* is unquestionably the root of this entire area of law; hence, we now attempt to determine how broad *Vaughan* is.

Vaughan, a brief opinion by Justice Douglas, has been described as "ambiguous"[6] and "cryptic"[7]-and rightly so. What is clear is that Justice Douglas upheld an award of attorneys' fees to a seaman where his employer had deliberately withheld payment of maintenance and cure. The confusion surrounds the theory under which Justice Douglas awarded the attorneys' fees. On the one hand, the adjectives that Justice Douglas used to describe the employer's behavior--"callous," "recalcitran[t]," "willful and persistent," *Vaughan*, 369 U.S. at 530-31, 82 S.Ct. at 999-imply that the award was meant to be a *punitive* sanction. On the other hand, his statements that a seaman is entitled to recover "necessary expenses" and that the seaman "was forced to hire a lawyer and go to court to get what was plainly owed him," *id.*, suggest that the fees were meant to be a *compensatory* award for out-of-pocket expenses. As one commentator put it:

> "Yet *Vaughan* did not clearly articulate if such an award was compensatory or punitive. Initially, the Court cited *Cortes* for the proposition that an

---

6 1B E. Flynn, D. Cooper & G. Raduazzo, *Benedict on Admiralty* § 51, at 4-80 (7th rev.ed. 1991).

7 Robertson, *Judge Rubin's Maritime Tort Decisions*, 52 La.L.Rev. 1527, 1572 (1992).

> employer's failure to make timely payments of maintenance and cure may entitle the seaman to the recovery of necessary expenses, intimating that the award was compensatory. The Court went on to stress, however, that the defendant's failure to make the payments was willful and callous, language that lends itself to the view that the award was punitive." Maslanka, *Punitive Damages in the Admiralty*, 5 Mar.Law. 223, 228 (1980); *accord* Davis, *supra*, at 106.

The commentators are divided as to whether the *Vaughan* award was intended to be compensatory[8] or punitive[9] in

---

[8] *See* 6 J. Moore, Moore's Federal Practice ¶ 54.78[3], at 54-503 n. 29 (2d ed. 1986) ("The [*Vaughan*] court found that ... the expenses of the suit could rightly be treated as part of the compensatory damage."); *id.* at 54-504 n. 30; 2 Norris, *supra* § 26:41, at 111 ("The allowance of counsel fees was justified by virtue of the inclusion of 'necessary expenses' as items of damage arising out of the suffering and physical handicap which follows the failure to give maintenance and cure."); Reinschreiber, *supra*, at 312 ("the [*Vaughan*] majority award[ed] attorney's fees as an item of compensatory damages").

[9] See G. Gilmore & C. Black, The Law of Admiralty 313 (2d ed. 1975) (Vaughan "awarded what were essentially punitive damages under the name of counsel fees."); Mallor, Punitive Attorney's Fees for Abuse of the Judicial System, 61 N.C.L.Rev. 613, 632 (1983) ("Although the Supreme Court awarded the seaman attorneys' fees under the rubric of compensatory damages, it emphasized the role that Defendant's bad faith had played in causing those damages."). That the award was punitive was also the view of Judge Rubin. See Sanchez v. Rowe, 870 F.2d 291, 293 (5th Cir.1989) ("Fees were awarded [in Vaughan] on the basis of the shipowners' bad-faith response to the seaman's underlying claim."). Judge Rubin has been described as "an acknowledged master of the maritime field." Robertson, supra, at 1527.

nature.

Fortunately, in deciphering *Vaughan*, we are not confined to the text of that enigmatic opinion or the unexpressed intent of its author. Since *Vaughan* was decided in 1962, the Supreme Court has cited it in seven cases. Each of these cases concerns the shifting of attorneys' fees; none of them concerns maritime law. In all seven cases, the Court has treated *Vaughan* as supporting an exception to the so-called "American Rule" that litigants generally must bear their own costs. In the first such case, Chief Justice Warren read *Vaughan* as establishing a compensatory basis for fee-shifting:

> "Limited exceptions to the American rule ... have been sanctioned by this Court when overriding considerations of justice seemed to compel such a result. In appropriate circumstances, we have held, an admiralty plaintiff may be awarded counsel fees *as an item of compensatory damages* (not as a separate cost to be taxed)." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967) (emphasis added).

Since *Maier Brewing*, however, *Vaughan* has now come to stand for the proposition that attorneys' fees may sometimes be awarded to a prevailing party when his opponent has acted in bad faith in the conduct of

litigation.[10] As one commentator has said, *Vaughan* now "is uniformly cited as a foundational case to the so-called 'bad faith' exception to the American rule." Reinschreiber, *supra*, at 312.[11] The purely compensatory description of *Vaughan* has not been aired in a majority opinion since *Maier Brewing*.[12] In short, the Court's

---

[10] *See Summit Valley Indus., Inc. v. Local 112*, 456 U.S. 717, 719-721, 102 S.Ct. 2112, 2114, 72 L.Ed.2d 511 (1982); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-67, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 848 (1980); *Runyon v. McCrary*, 427 U.S. 160, 183-85, 96 S.Ct. 2586, 2601, 49 L.Ed.2d 415 (1976); *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975); *F.D. Rich Co. v. United States*, 417 U.S. 116, 128-30, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974); *Hall v. Cole*, 412 U.S. 1, 4-6, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973).

[11] *Accord Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1118 (9th Cir.1988) ("Although *Vaughan* sounded in admiralty, the Supreme Court subsequently construed the case as an example of bad faith conduct justifying an award of attorneys' fees in civil litigation generally."); Green, *From Here to Attorney's Fees*, 69 Cornell L.Rev. 207, 232 n. 148 (1984) ("Both the Court and commentators have, in retrospect, characterized the *Vaughan* decision as involving the 'bad faith' exception to the American rule."). Professor Moore calls the bad-faith interpretation of *Vaughan* "a revisionist view." Moore, *supra*, at 54-506. Be that as it may, the Supreme Court is obviously the final arbiter of the meaning of its precedents.

[12] Justice Marshall, in a dissenting opinion, once revived the compensatory interpretation of *Vaughan*. *See Alyeska*, 421 U.S. at 280, 95 S.Ct. at 1633 ("the attorney's fee award [in *Vaughan*] was legitimately included as a part of the primary relief to which the plaintiff was entitled, rather than an ancillary adjustment of litigation expenses"). However, in a previous opinion written for the Court, Justice Marshall had endorsed the bad-faith view of *Vaughan*. *See F.D. Rich Co.*, 417 U.S. at 128-30, 94 S.Ct. at 2165.

current view is that the fee award in *Vaughan* should be understood as a sanction for bad-faith conduct in litigation.

However, our knowledge that *Vaughan* involved a bad-faith fee-shift does not immediately tell us whether awards of that type are compensatory or punitive. Although some have asserted that an award of attorneys' fees under the bad-faith exception to the American rule is compensatory,[13] the Supreme Court's view now may be otherwise. In *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973), Justice Brennan stated:

> "Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. In this class of cases, *the underlying rationale of 'fee shifting' is, of course, punitive,* and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." *Id.* at 5, 93 S.Ct. at 1946 (emphasis added; internal quotation marks omitted).

Hall's reasoning was reaffirmed in the recent case of Chambers v. NASCO, Inc., 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). Quoting Hall, the *Chambers* Court said: "in the case of the bad-faith exception to the American Rule, 'the underlying rationale of "fee-shifting" is, of course, punitive.'" *Id.* at 53, 111 S.Ct. at 2137. Even

---

[13] *See* Reinschreiber, *supra*, at 313.

three dissenters in *Chambers* cited *Hall* for the proposition that "the rationale for the bad faith exception is punishment." *Id.* at 75, 111 S.Ct. at 2148 (Kennedy, J., dissenting). The *Chambers* Court specifically rejected the argument made by the petitioner that fee-shifting is compensatory in character. This argument, the Court said, "fails utterly," *id.* at 54, 111 S.Ct. at 2137 n. 15, because even though the fees may have a compensatory *effect*, their primary *purpose* is punitive. The Court analogized to fines for civil contempt, which may be compensatory in consequence but are punitive in design.

Based upon the above, it might seem that the Second Circuit in *Kraljic* got it right: the *Vaughan* award was a form of punitive damage, but one limited to the recover of attorneys' fees. A careful reading of *Chambers*, however, belies the view that awards made under the bad-faith exception to the American rule are essentially punitive damages. The *Chambers* Court drew a distinction between fees awarded pursuant to the bad-faith exception, which are based upon a federal court's inherent power to sanction parties for their litigation behavior, and other "fee-shifting rules that embody a substantive policy, such as a statute which permits a prevailing party in certain classes of litigation to recover fees." *Id.* at 52, 111 S.Ct. at 2136. In other words, bad-faith fee-shifting is not based on the outcome or merits of a suit, but rather "on how the parties conduct themselves during the litigation." *Id.* at 53, 111 S.Ct. at 2137. While the *Chambers* majority opinion equivocated on the question whether a federal court has the inherent power to impose sanctions for conduct relating to the merits of the case, rather than the conduct of the litigation, *see id.* at 54 n. 16, 111 S.Ct. at 2138 n. 16, four justices were firmly of the view that bad-faith fee-

shifting may not be used to sanction prelitigation conduct. Justice Scalia argued that the American rule is deeply rooted in our history and "prevents a court (without statutory authorization) from engaging in what might be termed *substantive* fee-shifting, that is, fee-shifting as part of the merits award. It does not in principle bar fee-shifting as a sanction for procedural abuse." *Id.* at 59, 111 S.Ct. at 2140 (dissenting opinion; original emphasis). Likewise, Justice Kennedy, writing for himself and two others, argued that "[w]hen a federal court, through invocation of its inherent powers, sanctions a party for bad-faith prelitigation conduct, it goes well beyond the exception to the American Rule." *Id.* at 74, 111 S.Ct. at 2148 (dissenting opinion).

The upshot of all this is the following: the bad-faith exception to the American rule, of which the *Vaughan* award was an example, is not in a true sense punitive damages. Punitive damages are awarded on the basis of the merits of a case, whereas bad-faith fee-shifting sanctions abuses of the litigation process. As the *Chambers* Court said, quoting from the Fifth Circuit decision below, "'[f]ee-shifting here is not a matter of substantive remedy, but of vindicating judicial authority.'" *Id.* at 55, 111 S.Ct. at 2138 (quoting 894 F.2d at 705). This interpretation comports with the facts in *Vaughan*. Because the shipowner's liability for maintenance and cure was perfectly clear, it was an abuse of the litigation process to require him to "go to court to get what was plainly owed him under laws that are centuries old." *Vaughan*, 369 U.S. 531, 82 S.Ct. at 999.

At the end of the day, one need not definitely resolve whether *Vaughan* awarded compensatory damages

or established an exception to the American rule. Either way, its award clearly was *not* a punitive damages award and therefore *Vaughan* provides no support for the *Holmes* rule. *Vaughan* entitles injured seamen to recover attorneys' fees, or perhaps compensatory damages, when their employer unreasonably fails to pay maintenance on a timely basis. But in light of *Miles*, this Court should reconsider en banc whether punitive damages should be similarly available.

APPENDIX C

ORDER GRANTING EN BANC HEARING

MAY 18, 1994

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4711

DOMINGO GUEVARA,

Plaintiff-Appellee,

VERSUS

MARITIME OVERSEAS CORPORATION,

Defendant-Appellant

Appeal from the United States
District Court For the
Eastern District of Texas
Howell Cobb, Judge.

(Opinion September 30, 1994, 5 Cir., 1994, 34 F.3d 1279)

(Filed Nov. 4, 1994)

Before POLITZ, Chief Judge, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART and PARKER, Circuit Judges.

BY THE COURT:

A majority of the Judges in active service, on the Court's own motion, having determined to have this case reheard en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX D

Domingo GUEVERA, Plaintiff-Appellee,

v.

MARITIME OVERSEAS CORPORATION, Defendant-Appellant.

No. 92-4711.

United States Court of Appeals,
Fifth Circuit.

July 26, 1995.

Injured seaman sought recovery of damages under Jones Act. The United States District Court for the Eastern District of Texas, Howell Cobb, J., 792 F.Supp. 520, awarded damages under Jones Act and punitive damages for shipowner's failure to timely pay maintenance and cure, and shipowner appealed. The Court of Appeals, 34 F.3d 1279 affirmed. On rehearing en banc, the Court of Appeals, King, Circuit Judge, held that punitive damages are not available in cases of willful nonpayment in any action for maintenance and cure, whether it be tort or contract like, under the general maritime law; overruling *Holmes*, 734 F.2d 1110.

Affirmed in part and reversed in part.

Before POLITZ, Chief Judge, GOLDBERG,* KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENEVIDES, STEWART and PARKER, Circuit Judges.

KING, Circuit Judge:

We reheard this case en banc to reconsider our 1984 decision in *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir.1984), that an award of punitive damages under the general maritime law may be made when an employer willfully and callously refuses to pay maintenance or cure to an injured seaman. Developments in the law since 1984 have caused us to reevaluate the basis for such a punitive award and to conclude that *Holmes* should be overruled.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts and procedural history of this case are set forth in the panel opinion, *Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279 (5th Cir.), *reh'g en banc granted*, 34 F.3d 1279 (5th Cir.1994), but we summarize them here for the reader's convenience.

---

* Judge Irving L. Goldberg was a member of the panel that initially decided this case and he heard oral argument before the en banc court. Judge Goldberg died on February 11, 1995, before this decision was rendered.

Domingo Guevera was injured on May 29, 1990 while serving as a crewmember on the vessel *Overseas Philadelphia*. The vessel was owned and operated by Guevara's employer, Maritime Overseas Corporation ("Maritime"). The crew was preparing the ship to sail from Freeport, Texas, and Guevara was helping to secure the gangway. Because of the gangway's size, the ship's crane was used to lift it, and the task was being performed in the midst of considerable wind and rain.

Guevara was standing on a catwalk on the vessel pursuant to the orders of his superior, the vessel's bosun, who was operating the crane. As the gangway was lifted, it swayed in Guevera's direction, and the bosun ordered Guevara to move away from where he was standing. When Guevara tried to move, however, he momentarily caught the tread of his boot in the catwalk grating. After freeing himself, Guevara jumped from the catwalk to the deck below to avoid being hit by the gangway.

Unfortunately, Guevara injured his knee while falling to the deck. He promptly reported his injury to the third mate and he was given assistance. Despite his injury, Guevera continued to work on the vessel for a period of four months, apparently to qualify for union benefits. Upon the vessel's return to port, Guevara saw a doctor who diagnosed him as having a torn medial meniscus and a torn anterior cruciate ligament. Although Guevara was initially reluctant to undergo surgery, his knee was operated on in February of 1991. Beginning on February 5, 1991, Guevara made a number of formal demands on Maritime for maintenance and cure. Maritime, however, made no payment until June 24, 1991, at the earliest. Despite subsequent demands, Guevara did not receive his

second and final payment until December 29, 1991.

Guevara brought a negligence claim under the Jones Act and an unseaworthiness claim under the general maritime law against Maritime. Guevara also sought punitive damages for Maritime's failure to pay maintenance on a timely basis. The jury returned a verdict for Guevera, finding Maritime negligent, the *Overseas Philadelphia* unseaworthy, and Guevera not negligent. Further, the jury awarded Guevara $131,000 in compensatory damages for his injury and $60,000 in punitive damages for Maritime's arbitrary and capricious failure to pay maintenance.[1] Maritime now appeals.

In this opinion, we only address the question of whether punitive damages are still available in maintenance and cure cases. As a consequence, the portions of the panel opinion addressing the jury's finding of negligence (Part IIA), *see Guevara*, 34 F.3d at 1281-82, and the jury's finding of Maritime's arbitrary and capricious behavior (Part IIB), *see id.* at 1282-83, are reinstated.

---

[1] The $60,000 punitive award was based upon the jury's affirmative response to the question "Do you find that the defendant, Maritime Overseas Corporation, arbitrarily and capriciously failed to provide maintenance to the plaintiff, Dom[i]ngo Guevara on a timely basis?" The jury was then asked, "[W]hat sum of money do you find from a preponderance of the evidence should be awarded to the plaintiff as punitive damages, as that term has been defined in the charge?" The jury was not asked to award attorney's fees or compensatory damages on account of Maritime's failure to pay maintenance.

II. ANALYSIS AND DISCUSSION

A. The Doctrine of Maintenance and Cure

[1-4] When a seaman becomes ill or injured while in the service of his ship, the shipowner must pay him maintenance and cure regardless of whether the shipowner was at fault or whether the ship was unseaworthy. *See Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir.1987). "Maintenance" is the right of a seaman to food and lodging if he falls ill or becomes injured while in the service of the ship. "Cure" is the right to necessary medical services. This duty to pay maintenance and cure is of ancient vintage, and its origin is customarily traced back to the medieval sea codes. *See The Osceola*, 189 U.S. 158, 169, 23 S.Ct. 483, 484-85, 47 L.Ed. 760 (1903); *see generally* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 6-6, at 281 (2d ed. 1975); Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 6-28, at 348 (2d ed. 1994). Only "seamen" can assert the right to maintenance and cure, but the legal test for seaman status in maintenance and cure actions is the same as the inquiry for standing under the Jones Act. *See, e.g., Hall v. Diamond M Co.*, 732 F.2d 1246, 1248 (5th Cir.1984) ("The standard for determining seaman status for the purposes of maintenance and cure is the same as that established for determining status under the Jones Act.").

[5] In the United States, the doctrine of maintenance and cure appears to have been recognized by Justice Story in two cases which he decided while riding on circuit. *See Harden v. Gordon*, 11 F.Cas. 480 (C.C.D.Me. 1823) (No. 6,047); *Reed v. Canfield*, 20 F.Cas. 426 (C.C.D.Mass.1842) (No. 11,641). These cases

generally explain the seaman's right to maintenance and cure partly on humanitarian grounds and partly on economic grounds. As Gilmore and Black write:

> The doctrine not only protected the childlike and improvident seaman (who is usually "poor and friendless" and apt to acquire "habits of gross indulgence, carelessness and improvidence"), but served "the great public policy of preserving this important class of citizens for the commercial service and maritime defense of the nation." Even the shipowners derived an ultimate benefit from being made to assume these charges, since, as Story shrewdly pointed out, seamen were thereby encouraged "to engage in perilous voyages with more promptitude, and at lower wages."

Gilmore & Black, *supra*, § 6-6, at 281 (quoting *Harden v. Gordon*, 11 F.Cas 480 (C.C.D.Me.1823) (Case No. 6,047)) (footnote omitted). This obligation to provide maintenance and cure "embraces not only the obligation to pay a subsistence allowance and to reimburse the seaman for medical expenses he incurs; the employer must take all reasonable steps to insure that the seaman who is injured or ill receives proper care and treatment." Schoenbaum, *supra*, § 6-28, at 348; *see also Morales*, 829 F.2d at 1358.

B. Legal Developments and their Effect on *Holmes v. J. Ray McDermott*

Until 1984, we had never upheld an award of punitive damages for the willful nonpayment of maintenance and cure. In our 1984 *Holmes* opinion, however, we did uphold such a punitive award, and we supported the award with the following analysis:

> In *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962), the Supreme Court held that an employer's willful and arbitrary refusal to pay maintenance and cure gives rise to a claim for damages in the form of attorneys' fees in addition to the claim for general damages. Subsequent decisions have established that, in addition to such attorney's fees, punitive damages for such refusal are available under the general maritime law. *See Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir.1981) (collecting cases); *see also Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st.Cir.1973).

734 F.2d at 1118 (citations omitted). Thus, at the time of our *Holmes* decision, we relied upon three cases--the Supreme Court's *Vaughan*, this court's *Merry Shipping*, and the First Circuit's *Pocahontas*--and there was not a great deal of additional guidance to be found. Judge Garwood's well-considered concurrence to the panel opinion, *see Guevara*, 34 F.3d at 1284-90 (Garwood, J., concurring), together with significant developments in the law of admiralty and elsewhere, have caused us to rethink our position. We begin, therefore, by reexamining the precedents that form the foundation of our *Holmes* opinion, and in the end, we conclude that *Holmes's*

approval of punitive damages is no longer justifiable in cases of willful nonpayment of maintenance and cure.

1. *Vaughan v. Atkinson*

In *Holmes*, we cited *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962), only for the proposition that a willful and arbitrary failure to pay maintenance and cure gave rise to a claim for attorney's fees as well as general damages. *See* 734 F.2d at 1118. We did not cite *Vaughan* as an example of the Supreme Court's approval of punitive damage awards in the maintenance and cure context; indeed, we explicitly noted that it was "subsequent decisions" that made punitive damages available. *See id.* Nevertheless, it is possible that *Vaughan*, while only upholding an award of attorney's fees, announced a principle broader than its result. Thus, we now attempt to determine how broad this principle is.

Vaughan, a brief opinion by Justice Douglas, is a difficult decision--not because of its holding, but because of the rationale for its holding. It is clear that the majority in *Vaughan* upheld an award of attorney's fees to a seaman where his employer had deliberately withheld payment of maintenance and cure. *See Vaughan*, 369 U.S. at 529-31, 82 S.Ct. at 998-1000. The difficulty, however, stems from the theory on which the majority awarded the attorney's fees.

On the one hand, the adjectives used by the majority to describe the employer's behavior--"callous," "recalcitran[t]," "willful and persistent"--imply that the award of attorney's fees was meant to be a punitive sanction. *See id.* at 530-31, 82 S.Ct. at 999-1000. On the

other hand, the majority cited *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 371, 53 S.Ct. 173, 174, 77 L.Ed. 368 (1932), for the proposition that an employer's failure to pay maintenance and cure may entitle a seaman to the recovery of "necessary expenses." The Court further stated that the seaman "was forced to hire a lawyer to get what was plainly owed him," and that Court noted that "[i]t is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." *Vaughan*, 369 U.S. at 531, 82 S.Ct. at 1000-1001. This terminology clearly suggests that the attorney's fees were meant as a compensatory award for out-of-pocket expenses, as punitive damages are not "owed" as "expenses" and are not designed to remedy "damages suffered." Indeed, the language of the dissent implies that the majority's rationale for the attorney's fees award was compensatory, while **the dissent** believed that the rationale should be punitive:

> *Cortes* [, cited by the majority,] dealt with compensatory damages for a physical injury, and the opinion is that case contains nothing to indicate a departure from the well-established rule that counsel fees may not be recovered as compensatory damages.
>
> . . . . .
>
> However, if the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages.

> While the amount so awarded would be in the discretion of the fact finder, and would not necessarily be measured by the amount of counsel fees, indirect compensation for such expenditures might thus be made.

Id. at 540, 82 S.Ct. at 1004 (Stewart, J., dissenting) (citation omitted).[2] Because of this difficulty stemming from the *Vaughan* rationale, it is not surprising that commentators are divided as to whether the attorney's fees award was intended to be compensatory or punitive in nature. *Compare* 6 James Wm. Moore, *Moore's Federal Practice* ¶ 54.78[3], at 54-503 to -504 & n. 29 (2d ed. 1994) ("The [*Vaughan*] court found that when a seaman's employer refused to pay the seaman maintenance that 'was plainly owed under laws that are centuries old,' thus forcing the seaman to retain counsel and sue for it, the

---

[2] Indeed, on remand from the Supreme Court, the district court in *Vaughan* stated the following:

> As this court interprets the language of the Supreme Court, the intent and purpose of the same is that the trial court should make the seaman "whole", i.e., he should not be required to pay money out of his pocket to collect maintenance lawfully due to him. To accomplish this fact, the respondents are required to pay, by way of damages, a reasonable attorney's fee to libellant's proctor for prosecuting the proceedings made necessary to collect the seaman's maintenance claim.
>
> We do not read the majority opinion of the Supreme Court as suggesting that punitive damages are in order.

Vaughan v. Atkinson, 206 F.Supp. 575, 576 (E.D.Va.1962).

expenses of the suit could rightly be treated as part of the compensatory damage.") *with* Gilmore & Black, *supra*, § 6-13, at 313 (noting that *Vaughan* "awarded what were essentially punitive damages under the name of counsel fees").[3]

Fortunately, in deciphering *Vaughan*, we are aided by seven subsequent Supreme Court cases that have cited

---

[3] Surprisingly, Guevara does not argue that *Vaughan* supports the award of punitive damages in maintenance and cure cases. According to Guevera, the punitive damages issue was not before the Court in *Vaughan*--"[t]he seaman had not pled for punitive damages and the Court did not award punitive damages." Instead, as Guevera contends, "[t]he Court awarded exactly what the Plaintiff pled for, attorney fees incurred as a necessary expense in having to go to court...." *See also Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187, 1189 (11th Cir.1987) ("*Vaughan* is not dispositive because in that case only a claim for attorney's fees was asserted, not separate claims for both fees and punitive damages.").

Similarly, Maritime argues that the language used in *Vaughan* "clearly shows that the Supreme Court awarded compensatory damages, not punitive damages," but, contrary to Guevera's position, Maritime also contends that the issue of punitive damages was before the Court in *Vaughan* and was clearly rejected by the majority. In support, Maritime cites the language of the dissent and states that "[t]he dissent's discussion of exemplary damages shows that the issue of punitive damages was before the Court. The clear majority, however, rejected such [a theory]...." As mentioned, even though Guevara does not explicitly rely on *Vaughan* for his overall contention that punitive damages are available, Guevera does rely on *Holmes*. Because the instant case provides us with an opportunity to reexamine our position in *Holmes*, we find it prudent to determine whether *Vaughan* announced a broader principle in support of punitive awards in maintenance and cure cases.

the opinion.[4] In all seven cases, the Court has treated *Vaughn* as supporting an exception to the "American Rule" that litigants generally must bear their own costs. In the 1967 *Maier Brewing* case, the Court read *Vaughn* as establishing a compensatory basis for fee-shifting:

> Limited exceptions to the American rule... have been sanctioned by this Court when overriding considerations of justice seemed to compel such a result. In appropriate circumstances, we have held, an admiralty plaintiff may be awarded counsel fees **as an item of compensatory damages** (not as a separate cost to be taxed). *Vaughn v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962).

386 U.S. at 718, 87 S.Ct. at 1407 (emphasis added) (footnote omitted). Since *Maier Brewing*, however, *Vaughn* has come to stand for the proposition that attorney's fees can be awarded to a prevailing party when his opponent has engaged in bad-faith conduct during litigation. *See Shimman v. International Union of Operating Eng'rs*, 744 F.2d 1226, 1229-30 (6th Cir.1984) (tracing the citation

---

[4] *See Summitt Valley Indus., Inc. v. Local 112*, 456 U.S. 717, 102 S.Ct. 2112, 72 L.Ed.2d 511 (1982); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *F.D. Rich Co. v. United States*, 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974); *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967).

history of *Vaughn*), *cert. denied*, 469 U.S. 1215, 105 S.Ct. 1191, 84 L.Ed.2d 337 (1985). In fact, *Vaughn* is often cited as a foundational case for this "bad-faith" exception to the American Rule. *See Summitt Valley*, 456 U.S. at 721, 102 S.Ct. at 2114-15; *Hall*, 412 U.S. at 5, 93 S.Ct. at 1946; *Shimman*, 744 F.2d at 1230.

Our knowledge that *Vaughn* is later cited as a foundation of the bad-faith exception to the American Rule, however, does not tell us whether this type of fee-shifting is compensatory or punitive in nature. In *Hall v. Cole*, the Court made the following observation:

> Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. In this class of cases, the **underlying rationale of 'fee-shifting' is, of course, punitive**, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant.

412 U.S. at 5, 93 S.Ct. at 1946 (emphasis added) (citations omitted) (internal quotation omitted). *Hall's* reasoning was reaffirmed in the recent case of *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 113 L.Ed.2d 27 (1991). Quoting *Hall*, the *Chambers* Court noted that "in the case of the bad-faith exception to the American Rule, 'the underlying rationale of 'fee-shifting' is, of course, punitive.'" *Id.* at 53, 111 S.Ct. at 2137.

[6] A careful reading of *Chambers*, however, belies the view that awards made under the bad-faith exception to the American Rule are "punitive damages" in the sense that they punish the conduct giving rise to a plaintiff's claim. The *Chambers* Court distinguished between fees awarded pursuant to the bad-faith exception, which are based upon a federal court's inherent power to sanction parties for their litigation behavior, *see id.* at 47, 111 S.Ct. at 2134, and other "fee-shifting rules that embody a substantive policy, such as a statute which permits a prevailing party in certain classes of litigation to recover fees." *Id.* at 52, 111 S.Ct. at 2136. In other words, as the Court explained, "the imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves **during the litigation.**" *Id.* at 53, 111 S.Ct. at 2137 (emphasis added).

While the *Chambers* majority expressed no opinion on the question of whether a federal court has the inherent power to impose sanctions for conduct giving rise to an underlying claim, rather than for bad-faith conduct during the litigation process, *see id.* at 54 n. 16, 111 S.Ct. at 2137-38 n. 16, four justices were firmly of the view that bad-faith fee-shifting may not be used to sanction pre-litigation conduct. Justice Scalia noted that the American Rule "prevents a court (without statutory authorization) from engaging in what might be termed **substantive** fee shifting, that is, fee shifting as part of the merits award. It does not in principle bar fee shifting as a sanction for procedural abuse." *Id.* at 59, 111 S.Ct. at 2140 (Scalia, J., dissenting). Similarly, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Souter, made the following observation:

> [I]t is impermissible to allow a District Court acting pursuant to its inherent authority to sanction such prelitigation primary conduct. A court's inherent authority extends only to remedy abuses of the judicial process. By contrast, awarding damages for a violation of a legal norm, [such as] the binding obligation of a legal contract, is a matter of substantive law.... [The] bad-faith exception permits fee shifting as a sanction to the extent necessary to protect the judicial process.... When a federal court, through invocation of its inherent powers, sanctions a party for bad-faith prelitigation conduct, it goes well beyond the exception to the American Rule....

Id. at 74, 111 S.Ct. at 2148 (Kennedy, J., dissenting).

[7] The upshot of this extended discussion is that the bad-faith exception to the American rule, of which the *Vaughan* award is cited as an example, is not a punitive award in the "tort" sense of punishing the underlying conduct that gives rise to a plaintiff's claim. Tort-like punitive damages are awarded on the basis of the merits of a case, while bad-faith fee-shifting punishes abuses of the litigation process.

In the end, we need not definitely resolve whether *Vaughan* awarded attorney's fees as an item of compensatory or punitive damages. The award clearly has a "make-whole" compensatory aspect, *see Maier Brewing*, 386 U.S. at 718, 87 S.Ct. at 1407, and, based upon the

facts of *Vaughan*, the award also has a punitive aspect to the extent that it punished an abuse of the litigation process. *See, e.g., Chambers*, 501 U.S. at 52-53, 111 S.Ct. at 2136-37; *Shimman*, 744 F.2d at 1230-32. According to the case law, however, the punitive aspect of the *Vaughan* award is the bad-faith exception to the American Rule, and that exception is limited to a recovery of attorney's fees. The *Vaughan* award was clearly **not** a punitive damages award in the tort sense of punishing the underlying conduct that gave rise to the litigation, and the developing case law does not support such a position.

Simply put, all we can confidently say about *Vaughan* is that it entitles an injured seaman to recover attorney's fees--perhaps as part of compensatory damages--when his employer willfully fails to pay maintenance and cure. We cannot definitively conclude, however, that *Vaughan* establishes any broader principle to support *Holmes*'s rule that tort-like punitive damages, not limited to attorney's fees, are available in cases of willful nonpayment of maintenance and cure.

2. *Dyer v. Merry Shipping Co.*

In *Dyer v. Merry Shipping Co.*, 650 F.2d 622, 623 (5th Cir. Unit B July 1981), the widow of a deceased seaman brought a wrongful death cause of action based upon the Jones Act and the unseaworthiness doctrine of the general maritime law. The primary issue on appeal was whether "punitive damages [could] be recovered in a seaman's action brought under either general maritime law or the Jones Act, or both." *Id.* We did not answer the Jones Act question, noting that "[t]he district court may well be correct that punitive damages may not be

recovered in this Circuit under the Jones Act, although we need not decide the issue at this time." *Id.* at 626. As to the general maritime action, however, we concluded that "in this Circuit punitive damages may be recovered under general maritime law upon a showing of willful and wanton misconduct by the shipowner." *Id.* Consequently, we reversed the district court's dismissal of the plaintiff's claim for punitive damages. *See id.* at 626-27.[5]

Because *Merry Shipping* was an earlier panel opinion, we were bound by its holding in *Holmes*. Indeed, even though *Merry Shipping* dealt with punitive damages in an unseaworthiness context, the analysis, which we will soon discuss, was wholly applicable to maintenance and cure cases as well, and the court concluded with a broader declaration: "in this Circuit punitive damages may be recovered **under general maritime law....**" (emphasis added). The law, of course, is constantly developing, and with the 1990 decision of the Supreme Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), the analysis that we relied upon in *Merry Shipping* has been significantly undermined.

In reaching our holding in *Merry Shipping*--that punitive damages are available in a wrongful death action brought by a representative of a seaman under the unseaworthiness doctrine of the general maritime law--we

---

[5] The district court dismissed Dyer's claim for punitive damages on the ground that as a matter of law, such damages were not recoverable under either the Jones Act or the general maritime law. The court expressly declined to determine whether the facts of the case could give rise to punitive damages, if such damages were available. *See Merry Shipping*, 650 F.2d at 623.

relied upon a key proposition: "It does not follow ... that if punitive damages are not allowed under the Jones Act, they should also not be allowed under general maritime law." *Merry Shipping*, 650 F.2d at 626. To understand why we now view this proposition as problematic, an examination of the *Miles* analysis is necessary.

Miles v. Apex Marine Corp.

In *Miles*, the parents of a seaman killed by a fellow crew member ultimately recovered under the Jones Act for the negligence of the ship's operators, charterer, and owner, as well as under the general maritime law on the basis that the ship was unseaworthy as a matter of law. *See* 498 U.S. at 21-22, 111 S.Ct. at 319-20. The unseaworthiness ruling presented two questions concerning the scope of damages under the general maritime law: 1) whether a nondependent parent could recover for loss of society in a general maritime wrongful death action, and 2) whether the general maritime law permits a survival action for the decedent's lost future earnings. *See id.*, at 22-23, 111 S.Ct. at 320-21. A unanimous Court held that although the wrongful death of a seaman is actionable under the general maritime law, damages recoverable in such actions do not include loss of society. *See id.* at 33, 111 S.Ct. at 326. The Court also held that a general maritime survival action cannot include recovery for the decedent's lost future earnings. *See id.* at 36, 111 S.Ct. at 327-28.

The *Miles* Court began by thoroughly describing *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), in which the Court overruled its prior decision in *The Harrisburg*, 119 U.S. 199, 7 S.Ct.

140, 30 L.Ed. 358 (1886), to create a general maritime wrongful death cause of action applicable in all waters. The *Moragne* Court's decision was driven by two complementary rationales: consistency of the general maritime law with the policy implemented in the Jones Act and in the Death on the High Seas Act ("DOHSA") favoring wrongful death recovery, and "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" *Moragne*, 398 U.S. at 402, 90 S.Ct. at 1788 (quoting *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575, 22 L.Ed. 654 (1874)).

The *Miles* Court noted that *Moragne* "exemplifies the fundamental principles that guide our decision in this case":

> [i]n this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. **Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.**

498 U.S. at 27, 111 S.Ct. at 323 (emphasis added). The Court noted that *Moragne* did not set forth the scope of

recoverable damages under the maritime wrongful death action; thus, the Court sought guidance from comparable federal statutes.

Starting with DOHSA, the Court observed that the statute, by its explicit terms, prohibited the recovery of nonpecuniary damages. *Miles*, 498 U.S. at 31, 111 S.Ct. at 325; *see Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622-24, 98 S.Ct. 2010, 2013-14, 56 L.Ed.2d 581 (1978). Responding to the contention that admiralty courts have traditionally undertaken to supplement maritime statutes, the *Miles* Court stated:

> Congress has spoken directly to the question of recoverable damages on the high seas, and "when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Moragne* involved gap filling in an area left open by statute; supplementation was entirely appropriate. But in an "area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries."

Id. at 31, 111 S.Ct. at 325 (quoting *Higginbotham*, 436 U.S. at 625, 98 S.Ct. at 2015) (citation omitted).

Turning to the Jones Act, the Court observed that a well-established pecuniary limitation on damages existed under the Federal Employers' Liability Act ("FELA") at the time of the enactment of the Jones Act.[6] The Court noted that by "incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well." *Id.* at 32, 111 S.Ct. at 325. Even though a general maritime unseaworthiness action, rather than a Jones Act action, was at issue in *Miles*, the Court stated that "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 32-33, 111 S.Ct. at 326. The Court concluded that "there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman," and the Court noted that "[t]oday we restore a uniform rule applicable to all actions **for the wrongful death of a seaman**, whether under DOHSA, the Jones Act, or general maritime law." *Id.* at 33, 111 S.Ct. at 326 (emphasis added).

---

[6] The *Miles* Court explained that this pecuniary limitation on damages stemmed from the Court's decision in *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417 (1913). In *Vreeland*, the Court explained that the language of the FELA wrongful death provision was essentially identical to that of Lord Campbell's Act--the first wrongful death statute. Lord Campbell's Act and the many state statutes that followed it had consistently been interpreted to provide recovery only for pecuniary loss; thus, the *Vreeland* Court construed FELA in the same manner. *See Vreeland*, 227 U.S. at 69-71, 33 S.Ct. at 195-96.

The Court then addressed the second question: "whether, in a general maritime action surviving the death of a seaman, the estate can recover decedent's lost future earnings." *Id.* The Court noted that recognizing a right to recover lost future income in a survival action would be a "distinctly minority view," but the Court stated that "[t]his fact alone would not necessarily deter us, if recovery of lost future income were more consistent with the general principles of maritime tort law." *Id.* at 35, 111 S.Ct. at 327. The Court cited "strong policy arguments for allowing such recovery," including economic incentives and solicitude to seamen, *id.* at 35-36, 111 S.Ct. at 327-28, but the Court's decision was driven by the analytical framework that it had previously used:

> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act.
>
> The Jones Act/FELA survival provision limits recovery to losses suffered during the decedent's lifetime. This was the established rule under FELA when Congress passed the Jones Act, incorporating FELA, and it is the rule under the Jones Act. Congress has limited the survival right for seaman's injuries resulting

> from negligence. As with loss of society in wrongful death actions, this forecloses more expansive remedies in a general maritime action founded on strict liability.... Because [the] estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law.

Id. at 36, 111 S.Ct. at 328 (citations omitted).

[8] The analytical framework of *Miles* governs our approach to deciding damages issues in general maritime actions. In order to decide whether (and how?) *Miles* applies to a case, a court must first evaluate **the factual setting of the case** and determine what statutory remedial measures, if any, apply in that context. **If the situation is covered by a statute like the Jones Act or DOHSA**, and the statute informs and limits the available damages, the statute directs and delimits the recovery available under the general maritime law as well. The general maritime law will not expand the available damages when Congress has spoken to the relief it deems appropriate or inappropriate. *See Anderson v. Texaco, Inc.*, 797 F.Supp. 531, 536 (E.D.La.1992).

[9] The factual setting in *Miles* nicely exemplifies this approach. *Miles* involved a seaman in a factual setting of wrongful death, and the wrongful death of a seaman is covered by the Jones Act. Thus, even though the plaintiff also sued for wrongful death under the general maritime law, **the factual setting was still the wrongful death of a seaman**, and *Miles* compels damages uniformity with the statutory schemes that cover the same factual circumstances. *Cf. Miles*, 498 U.S. at 36, 111 S.Ct.

at 327-28 ("Congress has placed limits on recovery in survival actions that we cannot exceed. **Because this case involves the death of a seaman, we must look to the Jones Act.**" (emphasis added)). The Jones Act prohibits non-pecuniary recovery; thus, the *Miles* Court found that the general maritime unseaworthiness action for the wrongful death of a seaman must have a similar prohibition against non-pecuniary awards. Although the *Miles* Court did not mention punitive damages, they are also rightfully classified as non-pecuniary.[7]

Taking the analysis one step further, it should be clear that actions under the general maritime law for **personal injury** are also subject to the *Miles* uniformity

---

[7] *See Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1094 (2d Cir.1993) ("We are in general agreement with the view that plaintiffs who are not allowed by general maritime law to seek nonpecuniary damages for loss of society should also be barred from seeking nonpecuniary punitive damages."), *cert. denied*, ____ U.S. ____, 114 S.Ct. 1060, 127 L.Ed.2d 380 (1994); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987) ("Punitive damages are non-pecuniary damages unavailable under the Jones Act."); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir.1984) ("Punitive damages are nonpecuniary."), *cert. denied*, 471 U.S. 1136, 105 S.Ct. 2677, 86 L.Ed.2d 696 (1985); *Merry Shipping*, 650 F.2d at 626 (noting that its previous holding that only pecuniary damages are recoverable under the Jones Act casts doubt upon the availability of punitive damages under the Act); *Kozar v. Chesapeake and Ohio Ry. Co.*, 449 F.2d 1238, 1240-43 (6th Cir. 1971); *Anderson*, 797 F.Supp. at 534 ("[T]he post-*Miles* district court cases, in this district and in others, speak with one voice in concluding that punitive damages are nonpecuniary and, therefore, are not recoverable under *Miles*'s interpretation of the Jones Act.") (collecting cases); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296-97 (Tex. 1993).

principle, as non-fatal actions for personal injury to a seaman are covered by statute--i.e., the Jones Act.[8] Thus, many courts have extended *Miles*'s logic to prohibit the recovery of certain damages in personal injury factual settings that are covered by statute, even when these personal injury claims are brought under the general maritime law.[9] *See, e.g., Murray v. Anthony J. Bertucci*

---

[8] The Jones Act provides in the following relevant part:

> Any seaman who shall suffer **personal injury** in the course of his employment may, at his election, maintain an action for damages at law ... and in case of death of any seaman **as a result of any such personal injury** the personal representative of such seaman may maintain an action for damages at law....

46 U.S.C. § 688(a).

[9] Although the *Miles* Court discussed *Vreeland's* pecuniary limitation on FELA and Congress's incorporation of FELA into the Jones Act, it is important to remember that *Vreeland* was discussing the FELA wrongful death provision. *See Miles*, 498 U.S. at 32, 111 S.Ct. at 325-26; *Vreeland*, 227 U.S. at 69-71, 33 S.Ct. at 195-96; *supra* note 7. Thus, the Jones Act pecuniary limitation discussed in *Miles*--a limitation stemming from a FELA limitation on **wrongful death** claims--is arguably not applicable to **nonfatal personal injury** claims under the Jones Act. *See Horsley*, 15 F.3d at 202 & n. 2 ("[A]s concerns the Jones Act, *Vreeland* is inapposite to the availability of damages for **nonpecuniary** loss in cases involving **nonfatal** injuries.... [T]he evidence directly adduced by the *Miles* Court is not directly probative beyond the discrete confines of wrongful death actions.").

This distinction will not affect a claim for punitive damages, however, because "[i]t has been the unanimous judgment of the courts **since before the enactment of the Jones Act** that punitive damages are not recoverable under the Federal Employers' Liability Act." *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir.) (citing *Kozar*, 449 F.2d at 1240-43) (emphasis added), *cert. denied*, ____ U.S. ____, 114 S.Ct. 304, 126 L.Ed.2d 252 (1993); *see also Horsley*, 15 F.3d at 203 (quoting *Miller* in a personal injury case and denying recovery for punitive damages in unseaworthiness actions); *Kopczynski*, 742 F.2d at 560 ("Prior to enactment of the Jones Act in 1920, it had been established that only compensatory damages were available in FELA actions.").

The Sixth Circuit's *Kozar* opinion quoted from a number of Supreme Court cases, including *St. Louis, Iron Mountain & Southern Railway Co. v. Craft*, 237 U.S. 648, 35 S.Ct. 704, 59 L.Ed. 1160 (1915). In *Craft*, the Court indicated that an **injured** employee's right under the FELA was to recover **compensatory** damages. *See Craft*, 237 U.S. at 656, 35 S.Ct. at 705-06 (noting that the FELA "invests the injured employe[e] with a right to such damages as will **compensate** him for his personal loss and suffering" (emphasis added)); *id.* at 658, 35 S.Ct. at 706 (observing that the FELA allowed "the right existing in the injured person at his death" to survive to the injured's personal representative, and then stating that the personal representative could therefore recover "such damages as will be reasonably **compensatory** for the loss and suffering of the injured person while he lived" (emphasis added)); *see also Vreeland*, 227 U.S. at 65, 33 S.Ct. at 194 ("If he [the injured employee] had survived he might have recovered such damages as would have **compensated** him for his expense, loss of time, suffering and diminished earning power." (emphasis added)). Thus, when the Jones Act, incorporating FELA, was enacted in 1920, *see Miles*, 498 U.S. at 32, 111 S.Ct. at 325-26, injured employees did not have a right to recover punitive damages under the FELA. As a consequence, the same punitive damages bar was incorporated into the Jones Act. *See Pacific S.S Co. v. Peterson*, 278 U.S. 130, 136-39, 49 S.Ct. 75, 76-78, 73 L.Ed. 220 (1928)("[T]he right under the new [Jones Act] rule [allows a seaman] to recover **compensatory damages for injuries** caused by negligence" (emphasis added)).

Constr. Co., 958 F.2d 127, 131-32 (5th Cir.) (applying the principles of *Miles* to preclude an injured seaman's spouse from recovering loss of society damages under the general maritime law), *cert. denied*, ____ U.S. ____, 113 S.Ct. 190, 121 L.Ed.2d 134 (1992); *Michel v. Total Transp. Inc.*, 957 F.2d 186, 191 (5th Cir.1992)(applying *Miles* to a personal injury claim by a seaman and holding that "damages recoverable in general maritime causes of action for personal injury of a Jones Act seaman do not include loss of consortium"); *Anderson*, 797 F.Supp. at 534, 536 (noting in a personal injury action of seamen that their general maritime claims "encompass[ed] the same factual events and the same injuries as their Jones Act claims," and concluding that "[t]he application of *Miles* here compels the dismissal of the plaintiffs' unseaworthiness and general maritime negligence punitive damages claims").

After *Miles* it is clear that *Merry Shipping* has been effectively overruled. Its holding--that punitive damages are available in a wrongful death action brought by the representative of a seaman under the unseaworthiness doctrine of the general maritime law--is no longer good law in light of the *Miles* uniformity principle because, in the factual scenario of *Merry Shipping*, the Jones Act damages limitations control.[10]

---

[10] It is interesting to note that in *Merry Shipping*, an unseaworthiness case, we looked to the availability of punitive damages in maintenance and cure cases for guidance in determining whether punitive damages were available in the unseaworthiness context before us. *See Merry Shipping*, 650 F.2d at 625 (citing and discussing *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir.1973), which allowed punitive damages in a maintenance and cure action). Thus, if we similarly look to more recent unseaworthiness cases for guidance in determining

3. *Robinson v. Pocahontas, Inc.*

We turn to the last of our precedents that formed the foundation of our *Holmes* decision--*Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st cir.1973). In *Robinson*, the court upheld an award of punitive damages on a seaman's claim for maintenance and cure. *See* 477 F.2d at 1051-52. The court cited *Vaughan* for the proposition that the "Supreme Court held that a seaman could recover attorney's fees as damages where a shipowner was callous, willful, or recalcitrant in withholding these [maintenance and cure] payments." *Id.* at 1051. Significantly, however, the court emphasized the language in the *Vaughan* dissent: "'[I]f the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages.'" *Id.* (quoting *Vaughan*, 369 U.S. at 540 (Stewart, J., dissenting)).

To be sure, *Pocahontas* did uphold an award of punitive damages in a maintenance and cure context, but for at least two reasons, we believe that it is not a particularly strong precedent. First, the *Pocahontas* court's

---

whether punitive damages are still available in the maintenance and cure context now before us, we find it relevant, though not controlling, to observe that in the wake of *Miles*, appellate courts have held that punitive damages are now unavailable in unseaworthiness actions under the general maritime law. *See Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir.1994); *Miller*, 989 F.2d at 1454-59; *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296-97 (Tex.1993); *Sky Cruises Ltd. v. Andersen*, 592 So.2d 756, 756 (Fla.Dist.Ct.App.1992).

emphasis on the *Vaughan* dissent is troubling, especially because it seems that the court relied on the dissent to reach its conclusion that punitive damages--in excess of attorney's fees--may be awarded in maintenance and cure cases. As the Second Circuit noted in *Kraljic v. Berman Enterprises, Inc.*:

> The [*Pocahontas*] court justified the punitive damage award primarily by relying on Mr. Justice Stewart's dissenting opinion in [*Vaughan v.*] *Atkinson* which, as we have indicated, would have awarded exemplary damages under traditional concepts not necessarily limited to the amount of counsel fees. **The obvious difficulty with this approach is that the court followed the views of the dissenters in Atkinson and not the majority.** The court, we believe, correctly perceived that both majority and minority opinions in *Atkinson* in essence found that punitive damages were awardable in maintenance and cure cases. ***The inescapable fact is, however, that the majority opinion in Atkinson limited that recovery to counsel fees despite the explicit view of the dissenters that no such curb be imposed.***

575 F.2d 412, 415-16 (2d Cir.1978) (emphasis added) (citation omitted).

Second, even if we overlook the *Pocahontas* court's apparent reliance on the *Vaughan* dissent, the decision was rendered seventeen years before *Miles*. In light of *Miles*,

we cannot be sure that the First Circuit would reach the same result today as it did in *Pocahontas*. *Cf. Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir.1994) ("*Miles* mandates the conclusion that punitive damages are not available in an unseaworthiness action under general maritime law."). In short, *Pocahontas* was not rock-solid support to begin with, and because of *Miles*, we believe that its precedential weight has been further eroded.[11]

---

[11] Guevara contends that the *Pocahontas* court did not rely on the *Vaughan* dissent. According to Guevara, the *Pocahontas* court was "mindful that the Supreme Court had not been asked to award punitive damages in *Vaughan*," and as a consequence, it awarded punitive damages "in accord with traditional concepts of the law of damages." The language of the *Vaughan* dissent was cited merely as an example of this "traditional concept."

We note, however, that even though admiralty cases have long suggested that punitive damages might be available, *see, e.g., The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558, 4 L.Ed. 456 (1818) ("[I]f this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit [punishment] upon them in the shape of exemplary damages...." (emphasis added)), the Supreme Court has never affirmed an award of punitive damages in an admiralty case. Similarly, before *Vaughan*, there are very few lower court cases that actually awarded or affirmed an award of punitive damages in a general maritime law context. *See Gallagher v. The Yankee*, 9 F. Cas. 1091, 1093 (C.C.N.D.Cal.1859) (No. 5,196) (assessing punitive damages), *aff'd* 30 F.Cas. 781 (C.C.N.D.Cal.1859) (No. 18,124); *cf. Petition of Den Norske Amerikalinje A/S*, 276 F.Supp. 163, 174, 196-99 (N.D.Ohio 1967) (awarding punitive damages but noting that "punitive damages have never been visited upon a tortfeasor in an admiralty proceeding"), *rev'd sub nom. United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1146-48 (6th Cir.1969), *cert. denied*, 398 U.S. 958, 90 S.Ct. 2162, 26 L.Ed.2d 542 (1970).

4. The law of other circuits

As mentioned, our court and the First Circuit have upheld punitive damage awards in cases of willful nonpayment of maintenance and cure. In the Second Circuit's *Kraljic* opinion, the court also found that punitive damages were available in maintenance and cure cases, but the court relied on *Vaughan* to conclude that any "punitive" recovery is explicitly limited to attorney's fees. *See Kraljic*, 575 F.2d at 415-16.

In *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir.1987), the Eleventh Circuit squarely confronted the issue of "whether a seaman may be awarded punitive damages in addition to reasonable attorney's fees for the arbitrary and willful withholding maintenance and cure benefits." *Id.* at 1188. The court recognized that punitive damages in excess of attorney's fees were available in the First Circuit and in the Fifth Circuit, while the Second Circuit limited the award to attorney's fees. The court chose to rely on our *Merry Shipping* opinion, noting that "[f]ollowing the guidance of *Merry Shipping* ... it seems clear that even if exemplary in nature, attorney's fees, if fixed reasonably to cover only a proper fee award, would not foreclose the punitive purpose of a punitive damage award." *Id.* at 1189. Thus, the *Hines* court held that "both reasonable attorney's fees and punitive damages may be legally awarded in a proper case." *Id.* Of course, *Hines*'s reliance on *Merry Shipping* is now analytically

---

Moreover, even if we were to accept Guevara's construction of the *Pocahontas* rationale, we would still be influenced by the maritime developments brought on by *Miles*.

problematic because, as explained, *Merry Shipping* was effectively overruled by the later decision in *Miles*. Similarly, in *Manuel v. United States*, 50 F.3d 1253 (4th Cir.1995), the Fourth Circuit in dicta noted that "[c]ourts have long awarded punitive damages to seamen where maintenance and cure benefits have been arbitrarily and willfully denied." *Id.* at 1260. The court cited *Holmes* and *Pocahontas* for this proposition, however, and there was no mention of *Miles*.

The law in the Sixth Circuit is unclear. Dicta in *Al-Zawkari v. American Steamship Co.*, 871 F.2d 585, 590 n. 8 (6th Cir.1989), implies that punitive damages could be available, but the decision was pre-*Miles* and it cited *Holmes* as support. The district courts in the Sixth Circuit have also come to different conclusions. *Compare Hoeffling v. United States Steel*, 792 F.Supp. 1029, 1030 (E.D.Mich.1991) ("[A] claim for punitive damages under the doctrine of maintenance and cure is recognizable in this circuit.") *with Owens v. Conticarriers & Terminals, Inc.*, 591 F.Supp. 777, 792 (W.D.Tenn.1984) (holding that "because defendant's refusal to pay maintenance and cure was callous and willful, plaintiff is entitled to an award of punitive damages **limited to attorney's fees**") *and In re Mardoc Asbestos Case Clusters*, 768 F.Supp. 595, 599-600 & n. 1 (E.D.Mich.1991) (suggesting that punitive damages are not recoverable at all in the general maritime law). As mentioned, it is worth noting that the Sixth Circuit in *Miller* concluded that *Miles* precluded the recovery of punitive damages in general maritime unseaworthiness actions.

Finally, a recent Ninth Circuit opinion explicitly addressed the post-*Miles* propriety of a punitive damages award for the failure to pay maintenance and cure. In *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir.1995), the Ninth Circuit stated that "[b]ecause *Miles* did not consider the availability of punitive damages, and was not faced with a claim for maintenance and cure that has no statutory analog, it does not directly control the questions of whether punitive damages are available for the willful failure to pay maintenance." *Id.* at *7, at ____. Instead, the court looked to *Vaughan* for guidance, and it determined that "we see no support for punitive damages in addition to attorney's fees in *Vaughan* itself.... We see no other reason why punitive damages, in addition to attorney's fees, should be allowed." *Id.* at *8, at ____. As the court concluded, "[w]e therefore hold that punitive damages are not available, although attorney's fees are, where the shipowner has been willful and persistent in its failure to investigate a seaman's claim for maintenance and cure or to pay maintenance." *Id.* at *9, at ____.

To sum up, the cases that *Holmes* relied upon cannot now support the result in *Holmes*. *Vaughan* awarded attorney's fees, and not punitive damages; *Merry Shipping* did not involve maintenance and cure, and it has been overruled by *Miles*; and *Pocahontas* is questionable in light of its pre-*Miles* analysis and its apparent reliance upon the *Vaughan* dissent.[12] We turn now to the

---

[12] Of the federal appellate cases that *Holmes* does not cite, *Glynn* precluded the recovery of punitive damages, *Kraljic* limited punitive damages to the amount of attorney's fees, and *Hines* relied on the now-overruled *Merry Shipping*. The other circuit law is dicta at best, and the cases relied upon our *Holmes* decision.

independent impact of the *Miles* decision on the availability of punitive damages in cases of willful nonpayment of maintenance and cure.

C. The Effect of *Miles* on Maintenance and Cure Actions

Maritime argues that Guevara's recovery of punitive damages in his maintenance and cure action is barred by the dictates of *Miles*. Maritime's argument, of course, cannot rest on the specific holdings of *Miles*, as *Miles* did not involve a maintenance and cure claim. The logic and analytical framework of *Miles*, however, are clearly relevant, and they do support Maritime's argument.

Based on our interpretation of *Miles*, it should be clear that with maintenance and cure actions, we simply need to ask if "the factual setting of the case" or the "situation" is one covered by a statute like the Jones Act or DOHSA.[13] Seizing on the framework, some courts

---

[13] It is for this reason that Guevara's appeal to the double wage penalty provision of 46 U.S.C. § 10313 (formerly 46 U.S.C. § 596) is unavailing, as this statute does not cover maintenance and cure actions. *See Clinton v. Joshua Hendy Corp.*, 277 F.2d 447, 447-48 (9th Cir.1960) (per curiam) (holding that maintenance payments are not "wages" and are therefore not subject to the double penalty provision of § 596); *Ladzinski v. Sperling S.S. & Trading Corp.*, 300 F.Supp. 947, 958 (S.D.N.Y.1969) ("It has been held that the shipowner's duty of prompt payment of 'wages' under [§] 596 does not apply to the unearned wages due to the seaman injured in the service of the vessel ... or to the maintenance and cure benefits owed to the same seaman.") (collecting cases). Similarly, analogies to the Longshore and Harbor Workers' Compensation Act ("LHWCA") are not particularly relevant, as the LHWCA does not cover plaintiff seamen (like Guevara) or

have already determined that a maintenance and cure action is not covered by statute, and as such, this general maritime action is not subject to the *Miles* uniformity principle. *See, e.g., Anderson*, 797 F.Supp. at 536 ("[P]unitive damages for willful failure to pay maintenance and cure, a firmly rooted general maritime law claim, is unaffected by *Miles* because failure to pay is a contractual claim not reached by any maritime statute. Such claims do not implicate negligence or strict liability values."); *Breshears v. River Marine Contractors, Inc.*, Civ. A. No. 92-1850, 1992 WL 245656, at *2 (E.D.La. Sept. 10, 1992) ("Actions for the failure to pay maintenance and [c]ure are grounded in the general maritime law and have no counterpart in the tort provisions of DOHSA and the Jones Act.... The principles of uniformity found in *Miles* ... are, therefore inapposite to the determination of whether punitive damages are available for a failure to pay maintenance and cure."); *Howard v. Atlantic Pacific Marine Corp.*, Civ. A. No. 89-3073, 1992 WL 55487, at *2 (E.D.La. Feb. 28, 1992) ("[U]nlike unseaworthiness and negligence claims, maintenance and cure claims have no counterpart under the Jones Act or the DOHSA."); *Ridenour v. Holland America Line Westours, Inc.*, 806 F.Supp. 910, 911 (W.D.Wash.1992) ("The *Miles* Court, however, did not address maintenance and cure, which is an area of law in which Congress has not legislated against punitive damages. Thus this Court concludes that *Miles* is not dispositive on this point.").

---

maintenance and cure actions.

The analysis, however, is somewhat more complicated. A careful examination of the maintenance and cure action belies the contention that it has no analog in the existing statutory schemes. In *Cortes*, Justice Cardozo was faced with the question of "whether death resulting from the **negligent omission to furnish care or cure** is death from **personal injury** within the meaning of the [Jones Act] statute." 287 U.S. at 372, 53 S.Ct. at 174 (emphasis added). Initially Justice Cardozo recognized the peculiar nature of the shipowner's duty to provide maintenance and cure:

> The duty to make such [maintenance and cure] provision is imposed by the law itself as one annexed to the employment. Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident.
>
> . . . . .

The duty ... is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties. **For breach of a duty thus imposed, the remedy upon the contract does not exclude an alternative remedy built upon the tort.**

Id. at 371-72, 53 S.Ct. at 174-75 (emphasis added) (citation omitted); *see also id.* ("If the wrong is of such a nature as to bring it by fair intendment within the category of a 'personal injury' that has been caused by the 'negligence' of the master, it is not put beyond the [Jones Act] because

it may appropriately be placed in another category also."). Thus, as the Supreme Court explained by way of example:

> The failure to provide maintenance and cure may be a personal injury or something else according to the consequences. If the seaman has been able to procure his maintenance and cure out of his own or his friends' money, his remedy is for the outlay, **but personal injury there is none.** If the default of the vessel and its officers has impaired his bodily or mental health, **the damage to mind or body is none the less a personal injury because he may be free at his election to plead it in a different count.**

Id. at 373-74, 53 S.Ct. at 175 (emphasis added). The Court therefore concluded:

> While the seaman was still alive, his cause of action for personal injury created by the statute may have overlapped his cause of action for breach of the maritime duty of maintenance and cure, just as it may have overlapped his cause of action for injury caused through an unseaworthy ship. In such circumstances, it was his privilege, in so far as the causes of action covered the same ground, to sue indifferently on any one of them.

Id. at 374-75, 53 S.Ct. at 175, *see also Picou v. American Offshore Fleet, Inc.*, 576 F.2d 585, 587 (5th Cir.1978) (citing and discussing *Cortes* after noting that "[t]he

defendant takes the position that since a [personal injury] recovery could be available to [the plaintiff] in a simple action for maintenance and cure, he could not allege a tort claim comprehending the same elements of injury.... This is simply not the law."); Gilmore & Black, *supra*, § 6-13, at 311 ("Such [personal injury] damages may be recovered either in an action for maintenance and cure or in an action for negligence under the Jones Act.") (citing *Cortes*).

[10] Thus, as the Supreme Court has indicated, there are really two "types" of maintenance and cure action. The tort-like type involves a personal injury; i.e. typically a worsening of the seaman's physical or mental health caused by the failure to provide maintenance or, more likely, cure. The contract-like type need not involve a personal injury (although it may); it need only involve the loss of a monetary outlay. Because the tort-like maintenance and cure action involves a personal injury, however, it overlaps with the personal injury coverage of the Jones Act.[14] Such an action is frequently brought

---

[14] Indeed, in 1982, Congress amended the Jones Act by adding § 688(b):

> No action may be maintained under subsection (a) of this section [the original Jones Act] or under any other maritime law of the United States **for maintenance and cure** or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action....

46 U.S.C. § 688(b) (emphasis added). It is noteworthy that this denial of maintenance and cure to a class of seamen was added **under the Jones Act**, as it indicates a congressional recognition that maintenance

under the Jones Act. *See, e.g., Picou*, 576 F.2d at 586-87; *Gaspard v. Taylor Diving & Salvage Co.*, 649 F.2d 372, 376 (5th Cir.1981), *cert. denied*, 455 U.S. 907, 102 S.Ct. 1252 , 71 L.Ed.2d 445 (1982). As mentioned, once there is a statutory/general maritime law overlap in the factual circumstances that are covered, the *Miles* damages uniformity principle is invoked, and punitive damages would be precluded under the general maritime action for maintenance and cure.[15]

[11] Guevara seems to assert that our characterization of a Jones Act "overlap" is not accurate for maintenance and cure actions that give rise to punitive awards because "[i]t is the *willful* conduct of the vessel owner not *negligence* of the Captain or crew which give rise to [an] award of punitive damages for failure to pay maintenance and cure." This argument, however, is misconceived, as the willful refusal to pay maintenance and cure is not a cause of action separate from the negligent failure to pay maintenance and cure. As the Fourth Circuit explained in *Manuel*:

---

and cure actions are related to the Jones Act scheme.

[15] Guevara tries to circumvent the *Miles* uniformity principle by arguing that "Congress did not create the right to maintenance and cure nor ... did Congress create the right to sue a vessel owner for failure to provide maintenance and cure to its injured seaman." We note, however, that Congress neither created the warranty of seaworthiness nor fashioned the general maritime unseaworthiness action; nevertheless, this did not prevent the Supreme Court from concluding that the unseaworthiness action is subject to the *Miles* uniformity principle.

> [T]he ... court went astray by treating the **arbitrary and willful** refusal to pay maintenance and cure as a cause of action separate from the **simple** failure to pay maintenance and cure benefits when due. There is no cause of action specifically for the arbitrary and willful refusal to pay maintenance and cure. Under general maritime law, a seaman injured while employed aboard a ship is entitled to receive maintenance and cure, and he can bring an admiralty suit to recover any unpaid maintenance and cure benefits. Courts have long awarded punitive damages to seamen where maintenance and cure benefits have been arbitrarily and willfully denied. *E.g., Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118 (5th Cir.1984); *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1051-52 (1st Cir.1973). Punitive damages, however, is merely an additional remedy in the seaman's maintenance and cure action.

50 F.3d at 1259-60. Thus, the denial of maintenance and cure benefits gives rise to only one cause of action--failure to pay maintenance and cure--and this one action is cognizable under both the Jones Act and the general maritime law, although the action under the Jones Act for failure to pay maintenance and cure requires a personal injury as well. If willful conduct is demonstrated, it raises the possibility of a punitive award, but the cause of action for failure to pay maintenance and cure does not require or depend upon proof of willfulness.

[12] Based on this rationale, it should be clear that proving even a willful denial of maintenance and cure cannot justify an award of punitive damages after *Miles*. Under *Cortes*, a tort-like action for the failure to pay maintenance and cure is cognizable under the Jones Act, but **even if willful behavior is established**, the Jones Act does not provide for punitive damages. Under the *Miles* uniformity principle, therefore, the same cause of action under the general maritime law for the failure to pay maintenance and cure cannot provide a punitive recovery, even if willfulness is demonstrated.

Of course, our analysis is not yet complete, because in the instant case, Guevara brings a **contract-like** maintenance and cure action. Guevara suffered no personal injury from the failure to provide maintenance and cure, and therefore, there is no statutory overlap to invoke the *Miles* uniformity principle. In such a case, the general maritime law is not directly constrained by statute. Nevertheless, for several reasons, we believe that punitive damages should not be available in **any** action for maintenance and cure, even in those contract-like actions that can only be brought under the general maritime law.

First, even admitting that the primary reason for allowing punitive damages is to deter wrongful conduct on the part of a potential wrongdoer,--here, the shipowner--it seems peculiar to deny punitive damages to a seaman who suffers personal injury because of a willful failure to pay maintenance and cure, but to allow the possibility of a punitive recovery for a seaman who suffers only a monetary loss.

Second, Guevara is asking us to affirm a punitive damages award that is **not** available under related legislative schemes. As the Supreme Court stated in *American Dredging Co. v. Miller*, ____ U.S. ____, ____, 114 S.Ct. 981, 989, 127 L.Ed.2d 285 (1994), "[w]hile there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field." In the context before us, therefore, *American Dredging* counsels us to err on the side of "harmonization" with the legislative schemes, and that nudge towards harmony weighs in favor of prohibiting punitive damages in maintenance and cure cases, at least where, as here, a clear legal basis for the award of such damages is lacking.

Third, a concern for uniformity **within** federal admiralty law affects our decision. It makes little sense to create a fragmentation of admiralty law by allowing punitive damages in one class of maintenance and cure cases (contract-like), yet disallowing punitive damages in the other class of maintenance and cure cases (tort-like).

[13,14] Fourth, when no element of personal injury is involved, these contract-like maintenance and cure actions are just that--primarily contract-oriented claims. Punitive damages, however, are generally unavailable for breach of contract, and to the limited extent that the obligation to pay maintenance and cure is contractual in nature, allowing punitive damages for a breach thereof is anomalous. *See, e.g., Restatement (Second) of Contracts* § 355, at 154-56 (1979); 11 Samuel Williston, *A Treatise on the Law of Contracts* § 1340, at 209-12 (3d ed. 1968); 5 Arthur Linton Corbin, *Corbin on*

Contracts § 1077, at 437-39 (1964).[16]

III. CONCLUSION

[15,16] Our *Holmes* precedent for the availability of punitive damages in maintenance and cure cases is no longer well-founded. In particular, the advent of *Miles* brings about significant changes in the admiralty that we cannot ignore. We conclude that *Vaughan* and *Miles* still permit the recovery of attorney's fees in maintenance and cure cases as long as the proper showing of egregious fault is made. *See, e.g., Morales*, 829 F.2d at 1358. However, when we couple the weakened foundation of *Holmes* with our understanding of the *Miles* uniformity principle, we are persuaded that punitive damages should no longer be available in cases of willful nonpayment of maintenance and cure under the general maritime law. To this extent, therefore, *Holmes* is overruled. The district court's judgment is REVERSED insofar as it awarded punitive damages to Guevara for the willful failure to pay maintenance, but in all other respects, the judgment of the district court is AFFIRMED. Costs shall be borne by Maritime.

---

[16] We do not address Maritime's procedural due process concerns as they were not raised in the district court or in the initial appeal. *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir.) ("An appellant abandons all issues not raised and argued in its initial brief on appeal." (emphasis omitted)), *cert. denied*, ___ U.S. ___, 115 S.Ct. 189, 130 L.Ed.2d 122 (1994); *Quenzer v. United States (In re Quenzer)*, 19 F.3d 163, 165 (5th Cir.1993) ("Typically, we will not consider on appeal matters not presented to the trial court.").

APPENDIX E

United States Code Annotated
Title 46 Appendix. Shipping
Chapter 18--Merchant Seamen
Protection and Relief

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in case of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the

time of the incident giving rise to the action if the incident occurred--

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources--including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person--

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

APPENDIX F

Statement of Interest of Central Gulf Lines, Inc. and Waterman Steamship Corporation

Central Gulf Lines, Inc., a non-subsidized carrier, and Waterman Steamship Corporation, a subsidized carrier, are both shipowners and ship operators that operate a fleet of vessels under the American Flag. Both companies are subsidiaries of International Shipholding Corporation. They employ a significant number of United States maritime workers who are Jones Act seaman. On occasion their employees assert claims under the general maritime law for illness or injuries related to their employment, and in certain instances not related to their employment, which claims require action by the companies' employees to react to the claims. Obviously, the addition of punitive damages to these claims could have a dramatic effect on them and on the dwindling American merchant marine. Therefore, both companies are vitally interested in the decision of the En Banc Court because of its obvious impact upon their operations, on the declining U.S. merchant fleet, and on the general maritime law of the United States.

Interest of the *AMICI CURIAE*

The American Institute of Merchant Shipping (AIMS) is a national trade association representing twenty-three United States-flag carriers which own or operate approximately eleven million deadweight tons of

tankers, dry bulk carriers, containerships, and other oceangoing vessels engaged in the domestic and international trades of the United States. AIMS represents a majority of the United States-flag tanker and liner tonnage.

The American Waterways Operators (AWO) is a national trade association representing more than 300 companies involved in the inland and coastal barge and towing industry and the small- and medium-sized shipyards which build and repair tugs, barges, and other vessels. Its members include bulk commodities transporters; fleeting and harbor services operators; fueling, bunkering and lightering services operators, second-tier domestic shipyards; and affiliated services members.

The Defense Research Institute (DRI) is the largest defense association in the country and a national voice of defense attorneys.

The International Association of Drilling Contractors (IADC) represents the interests of drilling contractors throughout the world. Many of the more than 300 member companies of IADC drill for oil and gas in the offshore regions of the United States. IADC is dedicated to facilitating safe, efficient and environmentally responsible drilling operations in order to benefit its members, associated companies in oilfield services, and the public at large.

The Offshore Marine Service Association (OMSA) is a national trade association representing over eighty owners or operators of marine equipment which support 90% of the equipment servicing the United States offshore

oil and natural gas exploration and development industries. Its goals include encouraging and promoting the highest standards of safety, training, and environmental protection in the offshore marine transportation service industry.

The Texas Waterways Operators Association is a trade association representing barge and towing companies operating on the inland waters of Texas and serving its industries and ports.

Chevron U.S.A. Inc. is a United States corporation which owns and operates numerous American flag vessels which sail in American and international waters and employs their respective crews.

Hollywood Marine, Inc. is a United States corporation which operates numerous American flag vessels which sail in American and international waters and employs their respective crews.

Kirby Corporation is a United States corporation, which owns and operates numerous American flag vessels which sail in American and international waters and employs their respective crews.

Ocean Shipholdings, Inc. is a United States corporation which operates numerous American flag vessels which sail in American and international waters and employs their respective crews.

Sea-Land Service, Inc. is a United States corporation, which owns and operates numerous American

flag vessels which sail in American and international waters and employs their respective crews.

SeaRiver Maritime, Inc. is a United States corporation, which owns and operates numerous American flag vessels which sail in American and international waters and employs their respective crews.

Each *amicus* (or its members) has an interest in the continued competitiveness of the American shipping industry in national and international maritime commerce.

Except for the DRI, *Amici* (or their members) have the legal obligation to provide maintenance and cure to their seaman employees who either become ill or are injured in the course of their employment. Accordingly, each has an interest in the outcome of this appeal concerning an award of punitive damages for failing to pay maintenance and cure, present scheduled for reconsideration *en banc*. *Amici* have reviewed the briefs of the parties and suggest that additional discussion and amplification of the necessity for uniformity in the maritime law, the policy and history behind Congressional legislation and the relevant Supreme Court cases, and the availability *vel non* of punitive damages under the general maritime law for failing to pay maintenance and cure would benefit this Court during its *en banc* deliberations.

APPENDIX G

Affidavit of Paul M. Sterbcow

Before me, the undersigned authority, personally came and appeared, Paul M. Sterbcow, who swore on his oath as follows:

1. I am a partner in the New Orleans law firm of Lewis & Kullman. My legal practice involves the representation of significant numbers of ill and injured seaman who are entitled to maintenance (daily subsistence) and cure (medical care) benefits from their employers.

2. Typically my seamen clients who are in need of medical treatment receive such treatment from physicans of their own choosing. If a seaman's selection of a treating physician is reasonable, the basic law of maintenance and cure obliges the seaman's employer to defray the costs of medical testing and treatment deemed reasonably necessary and recommended by the seaman's physician.

3. Before the United States Court of Appeals for the Fifth Circuit handed down its decision in Guevara v. Maritime Overseas Corporation, 59 F.3d 1496 (5th Cir. 1995) (en banc), counsel for the employers of injured seamen would routinely accept the seamen's physicians' recommendations for diagnostic testing as prima facie reasonable. In the absence of some reason for justified suspicion, counsel for the employers would normally recommend that, without delay or demur, their clients

authorize and undertake to pay the reasonable costs of particular courses of diagnostic testing recommended by the seamen's physicians.

4. Immediately after the Guevara decision was announced, I encountered a marked change in the attitudes of employers' counsel. In two separate cases, I submitted to employers' counsel requests for authorization of medical tests recommended by seaman's physicians. In each case, counsel for the employer quickly informed me that no authorization or promise of payment would be forthcoming unless the seaman first submitted to a medical examination conducted by a physician selected by the employer. If the testing was to be done prior to such "independent" examination, then the injured seaman (or his attorney) would be responsible for payment.

5. In each case the employer's counsel referred to the Guevara decision in justifying his position. Now that Guevara has freed the employers of ill and injured seamen from any threat of punitive damages for wrongfully withholding maintenance and cure, the lawyers obviously believe their client's rational pursuit of self-interest will be better served by adopting a grudging approach to the provision of medical care for ill and injured seaman.

6. From the perspective of the employers' lawyers in question, the worst that can now happen to a recalcitrant employer is eventual liability for (a) compensatory damages for any aggravation of the seaman's injury or illness that can be proved to have been caused by wrongful delay or denial of the recommended medical treatment, and (b) attorney's fees in the event

that the employer is shown to have abused the litigation process. These potential sanctions are not perceived by the lawyers in question as sufficiently onerous to offset the immediate gain to be had by "playing hardball" with the litigious employees.

S/
PAUL M. STERBCOW

Sworn to and subscribed
before me this 2nd day
of October 1995.

S\
NOTARY PUBLIC